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ABSTRACT

Proceedings of the 1980 conference of the National Center for the Study of Collective Bargaining in Higher Education, which focused on campus bargaining the eighties, are presented. Contents are as follows: "The Economic Environment in the Eighties: the Necessity for Joint Action," by Gerie Bledsoe; "The Legal Environment: The Yeshiva Decision," by Aaron Levenstein; "The Legal Environment in the Eighties: The Agency Shop," by Joseph M. Bress; "Collective Bargaining in Higher Education: Expectations and Realities: A University President's Viewpoint," by John Silber; "Rights Issues: A Scramble for Power?" by Margaret K. Chandler and Daniel Julius; "Faculty Relations in Nonunionized Institutions," by Jerome Medalie; "Union Accountability: The Duty of Fair Representation," by Ildiko Knott; "The California Experience: Prototype of the Eighties?" by Thomas Mannix; "New Techniques of Conflict Resolution: Interest Arbitration in Iowa," by Robert Grant; "Faculty Accountability: Reality or Fantasy?" by Esther Liebert; "Bargaining and Conflict Management: New Directions for Academic Negotiations," by Robert Birnbaum; and "The Gray Area Between Due Process and Academic Judgment," by Benjamin Wolf. (SW)

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CAMPUS BARGAINING IN THE EIGHTIES

A Retrospective and a Prospective Look

Proceedings
Eighth Annual Conference
April 1980

AARON LEVENSTEIN, *Editor*
JOEL M. DOUGLAS, *Director*

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National Center for the Study of
Collective Bargaining in Higher Education
Baruch College—CUNY

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1. INTRODUCTION

This volume contains the prepared papers that were presented at the Eighth Annual Conference of the National Center which met shortly after the Supreme Court handed down its decision in the *Yeshiva* case. The fact that faculty in "mature" private institutions deemed to be "managerial" had lost the protections of the National Labor Relations Act was the paramount development under discussion. Indeed, it seemed to push all other issues out of the limelight.

The arguments of both sides had already been explored in depth at the Seventh Annual Conference when counsel for the University and for the Faculty Association summarized their briefs and rehearsed the oral argument they were later to give the Supreme Court. Further analysis had been provided by Woodley Osborne, counsel for the American Association of University Professors. (See *Landmarks in Collective Bargaining in Higher Education*, proceedings of the Seventh Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education, Baruch College, April 1979, pp. 18-46.)

The participants in the 1980 Conference had before them the special analysis of the *Yeshiva* decision that had been prepared by Aaron Levenstein and released by the National Center only a few weeks before the opening session was gavelled to order. Since this document provided a background for much of the discussion that ensued, it is reproduced at the appropriate place in these *Proceedings*.

Design of the Conference

The objective, as indicated by the over-all title of this volume, was to explore the prospects for campus bargaining in the '80s, and to provide a retrospective and prospective look. That could be achieved only by examining the trends in two spheres: (1) the economic environment that is shaping up in the period ahead, especially as it affects higher education; and (2) the legal environment being created by the courts, by the NLRB, and the state PERBs, and by the evolving pattern of collective bargaining agreements. There was virtual unanimity that lean years are ahead. None suggested that the hardships would lessen the frictions between administration and faculty. As the old Swedish proverb has it, "When the feedbox is empty, the horses will bite each other." Even so, there was a growing preoccupation with the question of whether academics in general could influence public opinion to a greater acceptance of the importance of higher education – an area in which some joint action could conceivably be undertaken by "labor" and "management."

Immediate Issues

Nothing that is likely to happen under the rubric of cooperation, however, will erase the concern over immediate issues raised at the bargaining table, such as the agency shop and the division of authority between administration and faculty in the making of decisions that affect the institution. The participants heard the view of one university president on how history has affected the role of faculty vis-a-vis the president.

In smaller group sessions, the conferees pondered such matters as the status of management rights versus faculty rights; the evolving concept of union accountability flowing from the duty of fair representation; and the responsibility of administration for clarifying, communicating and implementing standards of performance for the individual faculty member.

With an awareness that the economic constraints were likely to make the bargaining process more acerbic, attention was given to new techniques of conflict resolution, especially "interest arbitration" as it has been developed under the labor relations laws of Iowa governing public employees and faculty in the state's higher education institutions.

On a more conceptual level, discussion focused on the techniques of conflict resolution developed by social science and how they could be applied to improving attitudes and restructuring the procedures of collective bargaining in higher education. A three-sided discussion — presenting the viewpoints of an administrator, a union spokesman and an arbitrator — dealt with the ever-troublesome gray area between due process and academic judgment. An experimental session brought together union leaders and top-level administrators for an off-the-record exchange of views.

The Program

As in past Annual Conferences, not all the participants were in a position to provide written texts. But it may be helpful to the reader, despite the omissions, to see the framework of the sessions.

Monday morning, April 28, 1980

9:00 *INTRODUCTION*

Joel M. Douglas, Director, NCSCBHE

WELCOME

Joel Segall, President, Baruch College — CUNY

9:30 *PLENARY SESSIONS*
THE ECONOMIC ENVIRONMENT IN THE EIGHTIES

Speakers:	T. Edward Hollander, Chancellor, N.J. Department of Higher Education
	Gerie Bledsoe, Director of Collective Bargaining, AAUP
Moderator:	Robert Helsby, Director, Public Employment Relations Services

11:00 *THE LEGAL ENVIRONMENT IN THE EIGHTIES*

Speakers:	Joseph M. Bress, Esq., General Counsel, NYS Office of Employee Relations
	Woodley B. Osborne, Esq., Nassau & Osborne

Moderator: Joel M. Douglas

12:45 *LUNCHEON*

Topic: *COLLECTIVE BARGAINING IN HIGHER EDUCATION: EXPECTATIONS AND REALITIES – A UNIVERSITY PRESIDENT'S VIEWPOINT*

Speaker: John Silber, President, Boston University

Moderator: Joel Segall, President, Baruch College

Monday afternoon, April 28, 1980

2:30 *SMALL GROUP SESSIONS*

Group A: *RIGHTS ISSUES: A SCRAMBLE FOR POWER?*

Speaker: Margaret K. Chandler, Professor of Business, Columbia University

Daniel J. Julius, Director of Personnel Services, Vermont State Colleges

Discussant: Lawrence A. Poltrock, Esq., AFT General Counsel, DeJong, Poltrock & Giampieptro

Moderator: Julius Manson, Arbitrator, Professor Emeritus, Baruch College

Group B: *EMPLOYEE RELATIONS IN NON-UNIONIZED INSTITUTIONS*

Speaker: Jerome Medalie, Esq., Eidett, Slater & Goldman, P.C. Counsel to Northeastern University

Discussant: Neil S. Bucklew, Provost, Ohio University

Moderator: Samuel Ranhand, Arbitrator, Professor of Management, Baruch College – CUNY

Group C: *UNION ACCOUNTABILITY: THE DUTY OF FAIR REPRESENTATION (DFR)*

Speaker: Ildiko Knott, Prof. of Political Science, Faculty Organization, Macomb County Community College

Discussant: Richard M. Catalano, Vice Chancellor for Faculty and Staff Relations, CUNY

Moderator: Theodore H. Lang, Arbitrator, Professor of Education, Baruch College – CUNY, Former Director, NCSCBHE

PRESIDENTIAL ROUND TABLE

An off-the-record discussion between college and union presidents.

or their designees, to exchange philosophical views on faculty-administration relations in the 1980s.

Moderators: David O. Green, Vice President, Baruch College – CUNY

Irwin Polishook, President, Professional Staff Congress – CUNY, Vice President, AFT

Tuesday morning, April 29, 1980

9:00

Group D: *THE CALIFORNIA EXPERIENCE: PROTOTYPE OF THE EIGHTIES?*

Speakers: William Krist, California State College, Pres., Congress of Faculty Assns., NEA/AAUP/CSEA

Thomas Mannix, Director of Collective Bargaining Services, University of California System

Moderator: Richard E. Wilson, Vice President, Governmental Affairs, Amer. Assn. of Com. & Jr. Colleges

Group E: *NEW TECHNIQUES OF CONFLICT RESOLUTION*

Speaker: Robert Grant, Director of Employment Relations, State of Iowa, Board of Regents

Discussant: David Randles, Member, NYS Public Employment Relations Board, Arbitrator

Moderator: Maurice C. Benewitz, Arbitrator, Former Director, NCSCBHE

Group F: *FACULTY ACCOUNTABILITY – REALITY OR FANTASY?*

Speaker: Esther Liebert, Assistant to the President for Faculty and Staff Affairs, Baruch College – CUNY

Discussant: Richard A. Hazley, President, APSCUF

Moderator: Bernard Mintz, Executive Assistant to the President, William Paterson College of New Jersey

11:00 *PLENARY SESSION*

BARGAINING AND CONFLICT MANAGEMENT: NEW STRUCTURES FOR ACADEMIC NEGOTIATION

Speaker: Robert Birnbaum, Professor of Education, Teachers College, Columbia University

Discussants: Robert Miner, Dir. Higher Education, National Education Association

David Newton, Vice Chancellor, Long Island University

12:30 *LUNCHEON SYMPOSIUM:*

THE GRAY AREA BETWEEN DUE PROCESS AND ACADEMIC JUDGMENT

Speakers: Caesar J. Naples, Assoc. Vice Chan., SUS of Florida

Robert Nielsen, Director, Colleges and Universities Department, AFT

Benjamin Wolf, Arbitrator

Moderator: Aaron Levenstein, Associate Director, NCSCBHE

3:15 *SUMMATION*

Joel M. Douglas

About the National Center

For those who have had no previous contact with the National Center, it may be appropriate to review here the premises on which its program is based. Whatever differences are suggested by the fact of collective bargaining in higher education, one premise enjoys unanimity: the diverse interests can best be accommodated if the essential objective data are readily available to all the parties. This is the purpose of the National Center. Its continuing growth is evidence that both administration and faculty representatives have come to recognize that the Center is an invaluable resource, not only as an educational medium in its own right but as a repository for records, contracts, awards and other basic material. This has been possible only because both administration and faculty unions – AAUP, AFT, NEA and unaffiliated groups – have cooperated in building the Center's library and in providing participants and speakers for conferences, workshops and seminars. There is a shared conviction that stability and progress in higher education bargaining will be enhanced by this academic meeting ground.

Those who are unfamiliar with the Center will want to know about its various activities which include the following:

- The two-day Annual Spring Conference.
- Publication of the proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an Annual Directory of Faculty Contracts and Bargaining Agents.
- Bibliography of Collective Bargaining in Higher Education.
- The National Center Newsletter, issued five times a year, providing in-depth analysis of trends; current developments; major decisions of courts and regulatory bodies; updates of contract negotiations and selection of bargaining agents; reviews and listings of publications in the field.
- Monographs – complete coverage of a major problem or area, sometimes of book length.

- Regional workshops, using a hands-on format to provide training in subjects like negotiating a contract, grievance-processing and arbitration, implementation and administration of contracts.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, and important books and relevant research reports.
- Contract Data Bank maintained jointly with McGill University, providing for retrieval and analysis of specific clauses.
- Depository of arbitration awards in higher education, housed at the National Center and established with the cooperation of the American Arbitration Association.

Acknowledgements

The continuing growth of the Annual Conference, both in number of participants and in intellectual stature, is the result of widespread support. Planning of the content is the product of suggestions made by the Distinguished National Advisory Committee and the in-house Faculty Advisory Committee of Baruch College. Along with the staff, they are responsible for choosing the specific themes and designating the individuals who are invited to deal with them.

As the reader of these *Proceedings* will see, the Conference owed a great deal to the speakers who obviously devoted much time, energy and thought to the preparation of their papers. Not reflected in these pages but of major importance was the contribution of the moderators, discussants, and the leaders of the small-group sessions who, with learning, wit and skill, guided the discussions. Also to be thanked are the members of the audience in both the small groups and the plenary meetings who asked provocative questions and offered additional insights out of their own experience and expertise.

The wisdom of basing the National Center at Baruch College is once again confirmed by the smoothness, indeed grace, with which the administrative and secretarial personnel handled the multitudinous details involved in communicating with the speakers, registering the conferees, distributing the conference portfolios, organizing the small group assignments, arranging the meeting rooms, and providing the innumerable personal courtesies to which the members and guests of the National Center are entitled.

As in the past, the staff has earned personal recognition for enthusiastic and effective service. Ms. Molly Garfin, the Center's librarian and the author of much in its publication list, played a major role in the organization of the resource material distributed to the conferees. Some of the material in these *Proceedings* would have been lost without the cooperation of Professor Lawrence Arnot of the Baruch College Audio-Visual Department and Mr. Alan Pearlman of the Department of Education. The texts were painstakingly prepared by Mrs. Ruby Hill. Most important, the Center and the conferees owe a great debt to Mrs. Evan G. Mitchell, the Executive Assistant to the Director and the Production Director of Publications, who bore the brunt of coordinating the logistics of the conference.

Joel M. Douglas

2. WELCOMING ADDRESS

Joel Segall

President, Baruch College

One of the fringe benefits of my job is the opportunity to appear at a very successful, well-established program – such as this one – and pretend that I had something to do with its success.

But an annoying streak of candor compels me to disclaim any credit for the success of this 8-year old program. Oh – I do stand ready to find the money to cover the inevitable deficit, but that sort of work comes with the territory of my job and I do not claim credit for such a small detail. Instead, I point to two other factors:

First is the quality of these conferences: the discussion subjects, the speakers, the moderators, the discussants, the people attending – all are of extremely high quality and *that* is clearly a result of the dedication and persuasiveness of Dr. Joel Douglas, director of the center, his colleagues, his predecessor Professor Ted Lang, and an extraordinarily capable group of advisors.

The second factor is the extreme importance of the Conference theme: Campus Bargaining in the Eighties. That subject has become increasingly important over the last ten years, but the recent decision by the U.S. Supreme Court on Yeshiva University gives the theme first place in the list of burning issues faced by college administrators. The decision did assert that the faculty of Yeshiva was to be considered management by virtue of its role in the administrative process, but it left unanswered at least the following questions: (from Jan./Feb.'80, Newsletter of this Center)

1. What criteria must be met by a private institution if it is to be relieved of the duty to bargain?
2. Precisely when are faculty deemed to be "managerial" and therefore denied the protection of the National Labor Relations Act?
3. What alternatives are open to administrations that have been dealing with a union but are no longer compelled to do so?
4. What recourse is available to the unions directly affected?
5. Will governance structures be changed as a result of Yeshiva?
6. How will bargaining in the public colleges be altered?

As to these questions, this Center is rigorously impartial. It is impartial as between labor and management and even as to whether collective bargaining is desirable in all institutions. What the Center is *not* impartial about is the basic assumption of people in academic work: namely, that research and analysis are the most reliable guides – indeed, the *only* guides – to intelligent behavior. And that is the only function of Baruch College's National Center for the Study of Collective Bargaining in Higher Education and the Professions – to facilitate research and analysis. The cooperation of our colleagues from the many campuses across the country and the size and diversity of this audience today suggest that our estimate of the importance of the issues and of the Center's proper function is about right.

So – on behalf of the Baruch College National Center for the Study of Collective Bargaining in Higher Education and the Professions (affectionately known as the BCNCSCBHEP) and of the entire Baruch Community, I welcome you and wish you good fortune in this Conference; I have great confidence that we will all profit greatly.

3. THE ECONOMIC ENVIRONMENT IN THE EIGHTIES

T. Edward Hollander

Chancellor, N.J. Department of Higher Education

Lawrence R. Marcus

Assistant to the Chancellor

No one needs to remind us that the 1960s are over, though there are those among us who yearn for a return to those thrilling days of yesteryear. We suspect that many of those who saw the glass as half full began to change their minds when Richard Nixon won the presidency in 1968. By the time of the memorable OPEC price boost of 1973-1974, most Americans had come to the realization that our future would be somewhat different from our past. This rang true when it was a Republican president who instituted wage and price controls! As the decade ended, something which was "good as gold" was more sought after than something which was as "sound as the dollar." Double digit inflation settled in for a long run. In 1979, it was in excess of 13 percent. 1980 opened with an annualized inflation rate of nearly 20 percent. One of the network news broadcasts recently projected the prices of certain common purchases at the end of this decade if the current rate of inflation persists: a movie would cost $17.00, a Big Mac over $5.00, and a copy of *The Brethren* $45.00. Imagine what the high price tag items will cost!

It is hoped that the recent leaps in prices will be episodic and inflation will drop back down to a more normal level. Those "normal" price increases over time are disturbing enough. Between FY 1967 and FY 1979, the Consumer Price Index (CPI), just one measure of inflation in the American economy, rose by 116.6 percent.[1]* Increasing costs for food, fuel, housing and health care have strained our paychecks and seem to be sapping our economy. Oil prices alone are expected to continue to rise over the next two decades by 2-4 percent above the CPI. The Gross National Product (GNP), which grew at an annual rate of 3.4 percent from 1954 to 1979, is expected to slow down to a 2.5 percent annual growth for the next five years before accelerating, somewhat, to 2.9 percent at the close of the century. Several other indicators are equally disturbing: the average rise in output per man-hour, which held at a rate of 3.1 percent for the twenty years between 1948 and 1968, fell to 1.9 percent in the following five years and to only .8 percent in the next five; also, research and development spending has fallen from 3 percent of the GNP in 1964 to 2.2 percent in 1978, with federal support for that area declining continuously since 1967.[2]

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*Footnotes for this paper will be found on pp. 18-19.

State of Higher Education

In 1976, Andrew Lupton *et al.*, through their work for a New Jersey commission studying the structure of financial aid delivery systems, examined the financial state of higher education across the country. Using a complex and comprehensive set of indicators, they found that one-third of all colleges and universities were in a "somewhat unhealthy" condition; another 14.4 percent were in the "least healthy" category. Combining these two groups, one sees 22.2 percent of the two year colleges, 79.9 percent of the baccalaureate institutions, 55.1 percent of those that award a master's as the highest degree, and 50.2 percent of the universities that award doctorates. Among the independent sector, 86.6 percent were in financial difficulty, and 13.5 percent of the public colleges and universities were similarly situated.[3] If the study were done today, I would hazard that a higher proportion of public institutions would be among the economically troubled.

Frances and Stenner believe the Lupton study to be in the right direction but to have gone too far, too fast. They cite a need to analyze both the levels of revenues and expenditures as well as their rates of change.[4] Let us move to that, but first we must set the stage by putting in place the backdrop of enrollments.

As we all know, enrollments of college-age students are about to peak, and the nature of the student body will change dramatically. The final report of the Carnegie Council on Policy Studies in Higher Education graphically sets forth the likely "scenario" over the next twenty years. By 1997, the 18-24 year old cohort will decline by 23.3 percent but enrollments will decline by only 10 percent as colleges seek to attract new groups and greater proportions of existing clientele. Access will have been broadened so much that roughly half of the students in the year 2000 would not have been there 40 years earlier. The proportion of women on campus will increase from their 37 percent level in 1960 to a new level of 52 percent by the turn of the century. Similarly, minority participation will have grown from 4 percent to 25 percent, part-time students from 30 percent to 45 percent, two year enrollments from 16 percent to 41 percent, commuters from 60 percent to 85 percent, and those over twenty-two from 30 percent to 50 percent.[5] The 1970s, by the way, saw a 145 percent growth among students over thirty.[6]

The overall downward trend in admissions will not, as Mortimer and Tierney remind us, affect all institutions equally.[7] Those with superior competitive position will fare better than those whose attractiveness is limited and whose cost is high. Even with the increasing enrollments of the 1970s, 56 public and 130 independent institutions either closed, merged, or had some other change of control during those ten years, and some 630 colleges and universities suffered declines among FTE enrollments. The Carnegie Council predicts that by 1986, 47 more colleges will close, 75 will merge with another institution, and 64 more will undergo some other change of institutional control.[8]

Campus Costs and Faculty Compensation

Enrollments alone will not drive those changes. Rising costs will also play a significant role. While the CPI rose from 100 in 1967 to 216.6 in 1979, the Higher Education Price Index (HEPI) rose from 100 to 217.1 during that same period. The HEPI is a cumulation of the price of goods and services related to all aspects of institutional operation except for auxiliary enterprises and sponsored research. The latter category is summarized in the Research and Development Price Index which rose only to the 211.7 level in the period of comparison.[9] Thus, while costs for higher education were rising faster than the inflation rate, the amount made available for research did not keep pace.

The largest budget item in the operation of a college is the amount paid to faculty and staff. Fully two-thirds of the current expenditures of the average institution go to salaries and fringes. Two decades of growth in enrollments led to growth among the faculty as well. Between 1965 and 1970, alone, the FTE faculty complement increased 43 percent from 316,000 to 461,000.[10] During the 1970's, a hiring shift occurred as colleges sought to save money while simultaneously expanding service. In the period 1973 to 1977, the full-time faculty grew by 9 percent but increases among the part-time faculty more than quadrupled that growth.[11]

Another factor in burgeoning salary expenditures has been the aging of the faculty and the increase in levels of tenure. In 1972, 42 percent of all full-time faculty were forty or younger, while only 22 percent were fifty or over. By 1990, those figures will have reversed themselves: 24 percent will be forty or younger and over 50 percent will be fifty or older.[12] As one might expect, an accompanying element has been the growth among the tenured ranks; at the four year institutions, half of the faculty were tenured in 1969-70, but three-quarters were so honored in the current academic year.[13] The longer one remains in the profession, the higher the salary he/she commands. There are few "step one" faculty these days.

Faculty Losing Ground

Not only has the aggregate salary budget risen sharply over the last few decades, but individual compensation has increased as well. From 1948 to 1958, salaries rose 43 percent; in the following ten years they rose another 72 percent; again, from 1968 to 1978, they rose by 71 percent. However, that does not tell the entire story since the increases in constant dollars have been less dramatic:

20 percent and 45 percent increases for the first two periods but a 7.2 percent decline for the third. When the 1978-79 academic year is included, it is evident that faculty continue to lose ground; from 1972 to 1979 there has been a real decline of 13.6 percent, and the decline seems to be proceeding at an annual rate of 2.4 percent.[14] In 1978, the difference between CPI and faculty salary increases was $105 million.[15]

Not only have faculty not kept up with inflation, but they have fallen behind other groups of workers. In the first half of the 1970s, seventeen of nineteen other occupational groups kept pace with inflation better than faculty; in the last half of the decade, sixteen groups did better.[16] But while faculty lost ground, it is unlikely that they will gain much sympathy from the general population since they are still viewed as being a relatively affluent group. Those on academic year contracts in 1976-77 averaged $17,900 and those on full year contracts averaged $21,600. By comparison, all civilian full-time employees averaged $11,200; those employed in manufacturing, $12,600; state and local government employees as well as elementary and secondary school teachers, $11,700; and federal employees in GS grades, $15,200.[17] The data do suggest, however, that faculty are increasingly underpaid in relation to their education and investment prior to beginning employment.

Funding Sources

The money to pay faculty salaries and other institutional expenses comes from several different sources: federal and state tax support, endowments and donations, tuition, and grants. We have already noted the negative trend in the grant category by our examination of the Research and Development Price Index. The trend among the federal and state appropriation categories is equally disquieting. According to the Carnegie Council, the federal share of educational and general expenditures fell from 22.5 percent in 1969-70 to 16.4 percent in 1976-77, while the state share increased during that period from 36.6 percent to 41.6 percent.[18]

State revenues grew by 210 percent between 1968 and 1977, and state appropriations to higher education grew by 207 percent. State revenues going to support the colleges and universities held up well during that period, yet other areas of government spending are beginning to command an increasing priority for tax dollars.[19] In constant dollars, there has been no increase across the country as a whole in state appropriation per FTE student; the East suffered a major loss of 16 percent. During the last three years of that period, buying power decreased at the colleges and universities in thirty states, and over the last four years, higher education in eighteen states received a declining share of state revenues.[20]

An examination of the differences between FY 75 and FY 76 is revealing. All but five states increased the appropriation to higher education; this yielded a 13.4 percent increase. But controlling for enrollment increases (11.4 percent) and adjusting for inflation, there was a net loss of 4.6 percent per FTE. This loss affected all types of institutions except those focused on the health professions, and was experienced in thirty-two states, the worst of which were Georgia and

North Carolina with decreases of 17.1 percent and 22.6 percent per FTE respectively.[21] The share of the state budget going to higher education ranged from a high of 17 percent in Alaska to a low of 4 percent in Massachusetts; the nine states of the northeast held positions 41 and 44-51 among the fifty states and the District of Columbia.[22]

Tuition Fees and Endowments

Thus, tax support of higher education has failed to keep pace with inflation. Not only that, but we are all aware of Proposition 13 and Jarvis II in California. Similar spending caps and/or reduction measures were in place in twelve states by the beginning of 1979, and all but five states had considered such limitations during that decade.[23]

The result has been to force tuition upward. Recently, the *Chronicle of Higher Education* cited increases announced for the coming academic year: University of Rochester 11.6 percent, Stanford 12.3 percent, Amherst 18.2 percent, the Pennsylvania State College System 16 percent, and both the University of Kentucky and the University of Louisville 18.2 percent. Tuition will rise by 17 percent at MIT, an increase double the rate of increase of the previous year and the eleventh consecutive year of increased tuition charges. If, later this year, California voters approve a proposition which would cut income taxes in half, the tuition in the State College and University system would increase from $200 to $1,150 and in the University of California System from $750 to $2,350.[24] Bennett and Johnson predict that, in constant dollars (using 1975-76 as a base), tuition at the public institutions in 1985 will average $263 more than it was twenty years earlier, and in the independent sector will average almost $1000 more.[25]

Endowments have also been losing ground to inflation. At the most heavily endowed institutions, investment income provides an average of 12 percent of current revenues. However, for it to have maintained its 1973 purchasing power in 1978, it would have had to rise 33 percent! Shulman reports that in 1977-78 alone endowments at 144 colleges and universities (which account for more than half of the $10.5 billion in endowment wealth) experienced a real decline of about 5 percent in purchasing power. This loss amounted to more than $5.1 billion. Thus, at Yale for example, endowment income fell from 25 percent of revenues in 1968 to 13 percent ten years later.[26]

Effect on Faculty Unionization

The trend, then, seems to be clear: enrollments will decline; costs will go up; revenue will decline in constant dollars. Yet, the faculty need to eat and that is where the unions come in. The Carnegie Council's tally shows unionized institutions (excluding religious institutions) growing from 6.7 percent of the total in 1970 to 21.9 percent nine years later.[27] Neumann found collective bargaining at 188 four-year campuses and 283 two-year campuses in 1976.[28] By the following year, the total had grown to 550 campuses. One-quarter of all community colleges and one-tenth of all four-year institutions have opted for collective bargaining. It is currently estimated that unionization has come to 40 percent of all public colleges.[29]

While faculty vote for collective bargaining for many reasons, macrofactors such as changes in financial support for higher education and the depressed academic job market account for much of the trend toward faculty unions, despite the tradition of a more collegial approach to institutional governance.[30] The desire for job security plays a major role when one realizes that the demand for new faculty peaked in 1975 at 65,000 and will decline by 1985 to 20,000. Between 1981 and 1985, a total of 139,000 additional faculty will be required as compared to 207,000 in the preceding five years and 202,000 in the five years before that.[31] Although the experienced faculty member was sought after during higher education's growth period, more and more vacancies are likely to be filled at the instructor and assistant professor levels, or at the part-time level (now 32 percent of all faculty) as institutions attempt to hold down costs.[32] Thus, a faculty member is more likely to believe that a union will be better able to guarantee job continuation than might occur on one's own.

Similarly, at a time when salaries are not keeping pace with inflation, faculty (with the UAW and the Teamsters in mind) are more likely to turn to unions. However, despite initial studies which showed that unionized faculty made greater financial gains than non-unionized, later studies do not reveal convincing evidence that such is the case.[33]

Problems Ahead

We end by noting our belief that small is not beautiful. It never was. If it were, we'd have stayed small. Nevertheless, we may get smaller. If the Gross National Product grows at its projected annual rate of 2.5 percent, and if undergraduate FTE enrollment declines by the projected 10 percent, higher education will drop to 1.76 percent of the GNP by 1997-98, as compared to the 1978-79 level of 2.39 percent. If the GNP grows at the more historic rate of 3.5 percent, then higher education will decline to 1.50 percent of the total.[34] This will be painful, especially since support for education as a whole may decline as we reach zero population growth. Right now only one of every three voting adults currently has a child in the public schools.

Further, higher education has lost its high priority status among most governors, particularly those seeking to find ways to reduce taxes.[35] Some will even put real bullets into their guns and aim them at us. It is probable that most colleges will seek to accommodate declining revenues by first cutting back on non-personnel expenses since that is the easiest (though not necessarily most educationally sound) way. But, most institutions have already trimmed down as much as they can, and thus, as hard as it may be for us to do, we may shortly begin to look toward reductions in staff. The manner in which an institution seeks to maneuver through the eighties will determine the future of collective bargaining on that campus, though the *Yeshiva* decision will relieve that anxiety from the minds of the presidents and boards of most independent institutions.

While many economic projects have proved to be as wrong as General Westmoreland's light at the end of the tunnel, we fear that this one will be accurate. If true, it, of course, does not mean the end for higher education as we know it, but it does challenge us to plan carefully for excellence in this decade ahead.

FOOTNOTES

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4. THE ECONOMIC ENVIRONMENT IN THE EIGHTIES — THE NECESSITY FOR JOINT ACTION

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Economic predictions about the 1980s offer little encouragement to higher education. Contending successfully with these "hard times" will require a greater degree of cooperation among faculty members, administrators, and trustees than is currently seen on many campuses.

The Problem

There exists a widespread belief among most experts and lay persons that college and university enrollments will fall significantly in the 1980s and early 1990s, due to the decline in the birthrate beginning in the 1960s. Although experts agree that the pool of young people between 18-21 will be smaller over the next fifteen years, there is less agreement about how many students of all ages will actually enroll in postsecondary institutions during this same period.

The assumption that public and private support for higher education should contract in proportion to the expected enrollment decline is extremely dangerous. Anticipating this situation, many administrators are beginning to practice the "management of decline," perhaps prematurely.

Accurate predictions about enrollments and funding are complicated by several important social and political factors. Most obvious is the Proposition 13 mentality, the rise of the middle classes against "excessive" taxation and "big" government. Proposition 13 movements are supported in part by the traditional anti-intellectualism of America, the distrust of the intellectual, abstract concepts, and liberal learning. This attitude is naturally exacerbated by serious inflationary pressures.

Another complicating factor is the widespread demand for public assistance programs. Even the middle classes, faced by rising health care costs and care for senior citizens, are demanding public assistance. Other groups, such as the handicapped, the indigent, and the minorities, are effectively placing their needs before legislators. These demands will increase with inflation as unemployment increases and as energy costs and the expense of health services skyrocket. How should the representatives of the higher education community react to these legitimate demands for public assistance?

The closing gap between the starting salaries of college and non-college educated workers is also reducing enrollments. Although there are signs that this phenomenon is about to end, many young people are continuing to doubt the financial advantage of attending college.

Mitigating Factors

Optimists point to other developments in society which will help to keep enrollments up. Some predict a higher enrollment percentage among the traditional college-age students. Others predict a steady increase in the number of adults returning to campus for continuing education.

The factors contributing to each of these trends are fairly obvious. Above all, our democratic philosophy now includes the "right" of each citizen to a college education that fits his or her needs or qualifications. This concept, backed by federal funding, will increase the number of traditional and non-traditional students seeking postsecondary education.

Another factor helping to maintain enrollment levels is the rise in two-earner families. Because of economic necessity, more and more wives are entering the labor market each year. In addition to increasing the demand for educational services, they are improving the family's ability to send their children to college. These families will also place more emphasis on earning a college degree, especially for their daughters. (The high rate of divorce also makes it more essential that women be prepared to earn a sufficient independent income.)

Of the 90 million adult Americans who have never attended college, we are unable to determine how many will enroll in the years ahead. Many colleges have developed legitimate programs to service their needs, but one must suspect that these programs are less than adequate at most institutions. This may be particularly true of programs designed to attract the rapidly growing number of senior citizens, who need courses designed as much for aesthetic appreciation as for vocational preparation.

Continuing education is made necessary by the continuing revolution in technology and "scientific" management. Colleges and universities must learn to compete successfully with businesses and industries that will tend to keep "personnel development" programs within the confines of the corporate structure.

Other optimists suggest that the budgetary problems of higher education in the 1980's will be ameliorated by legislative inertia. Those familiar with legislatures know how difficult it is to accomplish a major change in spending patterns, especially in programs that are labor intensive. A college or university campus is usually an important part of a community, represented by a legislator eager to preserve jobs and revenue for his or her constituents. Even the most rational plans for consolidating educational institutions have floundered on the rock of provincial self-interest. For those who lobby against drastic cuts in spending for education, it will also be relatively easy to point out that the demand for education is stimulated by supply and that, regardless of predictions about the 1980's, demand will increase at least during the 1990's.

There are also those who are predicting a shortage of young faculty members in the late 1980's and early 1990's because of enrollment declines in graduate schools. Drastic cutbacks may seriously damage the viability of higher education if a generation or two of young Ph. D.'s are untrained or lost to industry.

The mitigating factors described above will not resolve the crisis facing higher education today. We will continually confront the simplistic formula which calls for a reduction in spending proportionate to the decline in enrollments. How are we to contend with this over-simplication?

Three Answers

First, it is more important than ever that faculty members and administrators, joined by all supporters of education, convince the public and their representatives of the social necessity of enhancing educational opportunity. More of time and resources must be devoted to publicizing the importance of being *educated* as well as being *trained* for an occupation or profession. As the most highly educated and, theoretically, articulate segment of society, surely we can convince our fellow-citizens that most of the social and technological problems of society can be treated in the short-term and cured in the long-term through education, research, and community service. While agreeing that public assistance must be provided to the handicapped and the indigent, we must remind those groups and the public that educational opportunity is the only reasonable, permanent remedy. The public must be made to understand that support both for public assistance and education are essential.

Second, in addition to stimulating the demand for higher education and working for adequate funding, we must do more to adapt our institutions and programs to the needs of the public. Some schools have made major changes in their programs already, but the process is only beginning on other campuses. More courses at night, on weekends, off-campus, and during the summer will be necessary. Curricular reform will be needed, along with innovative ways to combine liberal learning with vocational training.

Greater emphasis must be placed on community service. Not only must the campus and its facilities be made more accessible, but some of these facilities, especially the faculty, must be taken to the public. A concerted effort must be made in many communities to penetrate the town-gown barrier. More of the research capacity of the institution should be devoted to helping resolve the more mundane problems of the local community. The importance of pure research must be patiently explained to community leaders.

Third, faculty and administration must jointly promote academic quality. We should explain to the public and their representatives that there is no longer any need to emphasize *quantity*. During the 1960's and 1970's millions were invested in the largest and, perhaps, best system of higher education in history. It is now time, we must say, to concentrate our energies and resources on improving quality through smaller classes, individualized instruction and counseling, better (and safer) labs, equipment, and learning resources.

The Role of Faculty

Faculty development is also essential to maintaining and improving quality. More funds are needed for post-doctoral study, academic travel, sabbaticals, retraining, research, scholar exchanges, and other programs. Curricular reform will require "reassigned" time to develop new and attractive programs. Professional counseling for faculty members and assistance in obtaining outside funding are being used, though not adequately, on campuses to encourage faculty development. The continuing development of faculty should be encouraged, but not used primarily to threaten their tenure and professional role.

To make room for the new generations of scholars and teachers, older faculty members must be given incentives to retire, at least partially, at a younger age. Under certain conditions, faculty members may realize more income through early retirement than they would earn as regular full-time faculty members.

Since academic quality and campus morale are so closely interrelated, administrators should avoid the overuse of part-time faculty, long-term "foldingchair" and other non-tenure track appointments. These attempts to maintain "flexibility" result frequently in reduced academic standards, declining morale, and charges of inequity. The tenure system, if used properly, is no barrier to effective short- and long-term planning. Obviously, it restricts arbitrary and capricious decisions while demanding a high degree of administrative skill. Like democracy, it is an imperfect system, but better than any substitute yet proposed.

Stimulating the demand for higher education adapting programs to the needs of the public, and emphasizing quality instead of quantity will require a significant investment of time and resources. Each will require faculty members and administrators to leave the campus, whether to teach at a new site, recruit students, or convince the public that higher education offers the best and most cost-effective way of resolving our society's problems, now and in the future.

In the words of one Midwestern governor, we are too campus-oriented. We have not cultivated a broad base of support; we have taken the public for granted. We assume that we know what they want and need. We must first listen and then act. If we cannot adapt to the public's needs, we will surely decline in influence and resources.

Toward Joint Action

Today we are gathered – "labor" and "management" – to discuss collectively our common problems. Soon we will return to our campuses to resume the adversarial posture so basic to collective bargaining. We should continue to bargain as partisans, as instructed by our policy-makers. Perhaps we will be able to avoid antagonizing each other unnecessarily; perhaps we will recognize more clearly than before that our common goals transcend narrow self-interest and self-esteem.

If we are to contend successfully with the problems facing higher education, we must remain united by one goal – providing a better education to our students and a greater service to the public. Even in our relatively brief experience in collective bargaining in higher education, we have seen notable examples of union-management cooperation approaching the European model of co-determination, especially in the public sector, where joint or cooperative lobbying in the legislature has been so essential. We have also seen examples of faculty unions using their resources and talents in promoting the institution, thus stimulating the public's demand for our services.

Let both "labor" and "management" avoid their often myopic concentration on campus politics. As that governor warned, we must be engaging the world off-campus. We must take definite steps to integrate our campuses with that world. We must not take our public or private supporters for granted. Before assuming that decline is inevitable, let us go forth together to gain the financial support so necessary to our "noble experiment."

5. THE LEGAL ENVIRONMENT: THE YESHIVA DECISION

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A ten-year policy of the National Labor Relations Board has been reversed. (National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980)). But the impression created by the general press that the *Yeshiva* case has ended collective bargaining in private institutions of higher education is inaccurate. Many such universities and colleges will still be subject to mandatory collective bargaining under the provisions of the National Labor Relations Act.

Others, however, will find they are no longer obliged to sit down at the bargaining table with a faculty union, but only a careful analysis of the facts in the individual case can be determinative. The 5-4 decision of the High Court, as the majority opinion indicates, is not dispositive of all the possible issues. Both administration and the unions now need answers to the following questions:

- What criteria must be met by a private institution if it is to be relieved of the duty to bargain?
- When are faculty deemed to be "managerial" and therefore denied the protection of the National Labor Relations Act?
- What alternatives are open to administrations that have been dealing with a union but are now no longer compelled to do so?
- What recourse still remains available to the unions that are directly affected?
- Will governance structures undergo change as a result of pressures created by the *Yeshiva* decision?
- How will bargaining in public universities and colleges be altered by the new development in the private sphere?

These and other questions of a like nature are discussed in the following pages. The parties will be well advised to tread warily, with due regard to the details of the conclusion reached by the Court majority. The Court of Appeals had said expressly: "We stress that our function is not to examine *in vacuo* the governance procedures of all four-year private institutions of learning. . .Given the great diversity in governance structure and allocation of power at such ['mature'] universities it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding." (*N.L.R.B. v. Yeshiva University*, 582 F. 2d 686 (1978))

The Supreme Court majority opinion, written by Mr. Justice Powell, makes the same point in a somewhat different fashion. It chides the minority for basing its argument on generally observed practices in higher education and asserts that "our decision must be based on the record before us." *(Footnote 29)* If the Court's decision is to be understood and adapted to the needs of individual institutions, that record must be examined in detail. The majority also note that the precedents on which they rely, taken from the industrial context, "provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial." This is elaborated in the concluding footnote:

> We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded [from the protection of the National Labor Relations Act] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly non-managerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was too broad. *(Footnote 31)*

The Immediate Effect

Most directly affected by the Supreme Court decision are the private institutions of higher education in which faculty unions have already been certified or have been otherwise recognized as bargaining agents for faculty and staff. On the basis of the data accumulated by the National Center, as of January 1980 there were 86 such institutions, with 70 separate collective bargaining agreements in effect. (See Tables I and II.) The list itself, taken from the National Center's forthcoming annual *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education* is reproduced here in Table III. Significantly, the bulk of the institutions with authorized bargaining representatives are four-year colleges – 74 by our count.

All are touched by the *Yeshiva* decision, and it can be expected that a widespread reevaluation is in the cards. The institutions with 70 contracts are, in all probability, still bound by the provisions. On their expiration, the institution, if it meets the *Yeshiva* tests, is free to pursue either of these alternatives:

1. It may refuse further recognition of the union.

2. It may negotiate a new contract, but it can threaten at the bargaining table that if its terms are not met or if the union insists on raising certain issues, it will refuse to sign a contract.

3. It may proceed, as formerly, to renegotiate a contract in the interest of maintaining stable relations.

What concerned the minority of the Supreme Court may well come to pass: increased conflict on college campuses, thus defeating the purpose of the National Labor Relations Act, which is to prevent strikes by requiring recognition of and negotiation with properly designated bargaining agents. The dissent, written by Mr. Justice Brennan, says:

> Today's decision, however, threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement. By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the

> NLRA, and in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct. Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur." *(Citing Ford Motor Co. v. NLRB*, 441 U.S. 488, 499 (1979))

The minority supports this position by reciting the following economic data in Footnote 16:

> University faculty members have been particularly hard-hit by the current financial squeeze. Because of inflation, the purchasing power of the faculty's salary has declined an average of 2.9% every year since 1972. Real salaries are thus 13.6% below the 1972 levels. [Citing sources] Moreover, the faculty at Yeshiva has fared even worse than most. Whereas the average salary of a full professor at a comparable institution is $31,100, a full professor at Yeshiva averages only $27,100. . . In fact, a severe financial crisis at the University in 1971-1972 forced the president to order a freeze on all faculty promotions and pay increases.

To this, the majority retorts that such considerations are irrelevant: "Nor can we decide this case by weighing the probable benefits and burdens of faculty collective bargaining. . . That, after all, is a matter for Congress, not this Court." *(Footnote 29)*

TABLE I
PRIVATE INSTITUTIONS
RECOGNIZED BARGAINING AGENTS

AFFILIATION	4-Year and Professional Schools	2-Year	2/4 Year	Total
AAUP	23	1	1	25
AAUP/Independent	1	-	-	1
AFT	26	6	-	32
NEA	15	2	-	17
Independent	12	2	-	14
Total	77*	11	1	89**

*74 institutions, 3 of which have 2 faculty bargaining units.

**86 institutions, 3 of which have 2 faculty bargaining units.

TABLE II
PRIVATE INSTITUTIONS
CONTRACTS WITH BARGAINING AGENTS

AFFILIATION	4-Year and Professional Schools	2-Year	2/4 Year	Total
AAUP	19	1	1	21
AAUP/Independent	1	-	-	1
AFT	21	5	-	26
NEA	13	2	-	15
Independent	6	1	-	7
Total	60	9	1	70

The Managerial Test

The basic thrust of the majority decision is that faculty are not under the umbrella of the National Labor Relations Act and that administration may refuse to negotiate with a union representing faculty if they are "managerial." In simplest terms, the Court has said that the National Labor Relations Board may not certify a union of faculty or require administration to deal with it if the faculty "are endowed with 'managerial status' sufficient to remove them from the coverage of the Act." Just what would be the indicia of such a managerial role vested in the faculty?

Before an administration can give an affirmative answer it must look at the following factors:

1. *Could the institution be properly described as a typical "mature" private university or college in which authority is "divided between a central administration and one or more collegial bodies"?*

Because such terms are likely to require further definition, it can be expected that future cases will revolve around the question of whether the institution qualifies as "mature". The characterization was derived by the Court majority from J. Victor Baldridge's *Power and Conflict in the University.* Parties interested in exploring the elements involved in determination of maturity would do well to consider also the distinction between "upper tier" and "lower tier" institutions made by Ladd and Lipset in their *Professors, Unions, and American Higher Education* (American Enterprise Institute for Public Policy Research, Washington, D.C., 1973), originally prepared for the Carnegie Commission on Higher Education. They write, at pages 16-17:

> "We are the university" is a valid description of the standing of professors at the top of the academic hierarchy, but it decidedly does not hold for teachers at many lesser institutions. This is an important reason why the Carnegie survey data show faculty receptivity to unionization lowest at universities and generally at elite centers of higher education, and strongest at two-year colleges and other schools of low scholarly standing. Since the enormous expansion of higher education over the past decade has occurred disproportionately at the lower levels, in institutions where faculty independence, hence professional standing, is tenuous at best, we have identified one component of the increased receptivity to unionism in the academic community.

It is highly dubious that two-year institutions will be able to meet the test of "maturity."

Defining the Authority

2. *Are the authority of the faculty under the by-laws of the institution and its practices of such a nature that they can be described as truly managerial?*

The Supreme Court's criterion is that "managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management." It should be noted that the dissenters disagreed with the majority on the degree of independence enjoyed by Yeshiva faculty and on the question of whether the faculty, in adopting certain decisions, are aligned with management. This can still prove to be a sticky question in future cases. The majority, apparently recognizing the looseness of the present criteria, say:

"Although the Board has established no firm criteria for determining when an employee is so aligned [with management], normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."

Describing the unique position that faculty occupy under a "collegial" system of "governance," the Court holds that the mere fact of professionalism does not disqualify instructors from performing a managerial role. It holds that the employer institution is entitled to "the undivided loyalty" of its representatives who are thus "aligned" with management.

The dissenters, on the other hand, argue that all employees are "aligned" with management in many respects. In the case of faculty, they add, "the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom."

Effect of Faculty Recommendations

3. Do the faculty have the power to make "effective" decisions or recommendations "in the interest" of the institution?

The majority opinion notes that even supervisory personnel are excluded from mandatory bargaining, but it does not pass on the question of faculty's supervisory status because the managerial exclusion is sufficient to resolve the issue at Yeshiva. Since faculty's supervisory role may also be grounds for exclusion, it is helpful to examine the provisions of Sec. 2(11) of the Act which defines a supervisor as follows:

> The term "supervisor" means any individual having authority, *in the interest of the employer,* to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to *effectively recommend such action,* if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Emphasis added)

Responding to the argument of the Yeshiva faculty union, the Court points out that the Board itself does not suggest "that the role of the faculty is merely advisory and thus not managerial." But Justice Powell adds *(Footnote 17)*:

> The Union does argue that the faculty's authority is merely advisory. But the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation... The statutory definition of "supervisor" expressly contemplates that those employees who "effectively... recommend" the enumerated actions are to be excluded as supervisory... Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

Similarly the Court dismisses the argument that since the statute expressly includes professional employees faculty, *qua* professionals, are covered. The majority point out that professionals may still have a managerial or a supervisory role, and that such a role, despite their professional status, has disqualified them in other cases.

Issues of Fact

Before any administration can decide that it is immune from NLRB interventions, it must be clear on the extent of faculty authority. A pro forma system of collegiality in which the faculty do not have any genuine impact on appointments, reappointments, tenure, and other decisions of import may not stand up as a defense against NLRB jurisdiction.

In the *Yeshiva* case, the majority felt that the Board had failed to come up with the relevant findings of fact. Justice Powell's decision is quite emphatic on this point. He says: "The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than an examination of the facts of each case." It should be remembered that ordinarily the Supreme Court defers to the Board's findings of fact; in this case, however, the Board reasoned primarily from general conclusions on prevailing campus practices, and the majority therefore preferred to accept the Court of Appeals' view on the evidence that "the faculty of Yeshiva University 'in effect, substantially and pervasively operat[e] the enterprise.'"

That is the ultimate test. In actual practice, it must be anticipated that there will be controversy about the alleged facts. In the future, the NLRB may be expected to give close scrutiny to the governance system in determining questions of representation. In so doing, it is likely to pursue the direction taken by the minority which said on this point that the majority conclusion was "bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the 'community of scholars' of yesteryear." It should not be overlooked that the majority conclude by reiterating their willingness to give due deference to the Board's findings of fact: "As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act."

This still leaves some latitude for the Board to find that a sufficient degree of managerial authority does not exist in individual cases, particularly in view of the discrepancies in the range of faculty powers from campus to campus.

The Facts at Yeshiva

Administrators henceforth will compare their own governance system with the situation at Yeshiva, as found by the majority of the Court:

(a) "Their (the faculty's) authority in academic matters is absolute."

(b) "The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion."

(c) "They decide what courses will be offered, when they will be scheduled, and to whom they will be taught."

(d) "They debate and determine teaching methods, grading policies, and matriculation standards."

(e) "They effectively decide which students will be admitted, retained, and graduated."

(f) "On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school."

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(g) "The faculty at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules."

(h) "Faculty welfare committees negotiate with administrators concerning salary and conditions of employment."

(i) "Although the final decision is reached by the central administration on the advice of the dean or director, the overwhelming majority of faculty recommendations are implemented."

(j) "Even when financial problems in the early 1970s restricted Yeshiva's budget, faculty recommendations still largely controlled personnel decisions made within the constraints imposed by the administration."

(k) "Some [of the University's] faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school."

(l) Administrators in two schools testified that "no academic initiative of either faculty had been vetoed since at least 1969."

(m) When the faculty of one of the colleges "disagreed with the dean's decision to delete the education major, the major was reinstituted."

Impact on Governance Structures

An interesting question is raised by the possibility that institutions not able to meet the criteria of the *Yeshiva* case may move in the direction of increasing faculty authority in order to render them "managerial" within the Supreme Court majority decision.

The minority raises this possibility in the broader context of industry as a whole. First, it declares that "the frequency with which an employer acquiesces in the recommendations of its employees" will not "convert them into managers or supervisors. Rather, the pertinent inquiries are who retains the ultimate decisionmaking authority and in whose interest the suggestions are offered." The majority had dismissed both of these contentions by pointing out, first, that in industry the ultimate authority is beyond the reach of the managers, being vested in the Board of Directors, and that this does not destroy the managerial status; secondly, the majority found that faculty decisions were indissolubly intertwined with the institutional interest so that the faculty, in making the putative managerial decisions, was not acting "in its own interest."

In general, however, the minority was concerned that an employer now clearly covered by the Act might escape the burdens of mandatory bargaining by revising internal procedures and thus "deny its employees the benefits of collective bargaining on important issues of wages, hours and other conditions of employment merely by consulting with them on a host of less significant matters and accepting their advice when it is consistent with management's own objectives."

Nevertheless, there would seem to be little doubt that a college or university, by revising its governance structure, could conceivably bring its faculty into a framework that the majority would accept as "managerial." That may not always be easy. As all parties to the current controversy have acknowledged, university structure is truly unique. Campus bargaining differs from the normal course encountered in industry not only because of the fact of professionalism but also because of the extraordinary "duality of authority" that exists in academe.

"Duality of Authority"

This aspect of the problem is not explored in either the majority or the minority opinion, but it is certain to play a part in the way the *Yeshiva* doctrine evolves in the future. The concept of a "parallel authority structure" prevailing in higher education institutions has been described by Baldridge in the work referred to above (John Wiley & Sons, Inc., New York, 1971, pp. 114-5):

> The university's bureaucracy is not only multilayered but characterized by complicated parallel authority structures. At least two authority systems seem to be built into the university's formal structure. One is the bureaucratic network, with formal chains of command running from the trustees down to individual faculty members and students. Many critical decisions are made by bureaucratic officials who claim and exercise authority over given areas. As long as they go unchallenged they are free to exercise their authority. This is more often true in the relatively "routine" types of administration than in the "critical" areas; for example, a bureaucrat might act on his own authority in admissions processing, but in the critical area of changing the admissions standards, he would hesitate to act without consulting the faculty.

To bring the faculty clearly within the parameters of the managerial function may very well require alterations in this traditional model of a balanced duality, with a recognition of fairly well defined spheres of authority allocated to faculty and to administration.

Discontinuing Past Relationships

Obviously, the major impact of the decision will be on those campuses where organization has been under way or where NLRB elections are pending. It can be safely assumed that in most such situations the administration will sit tight under the shelter of the *Yeshiva* decision and will insist that no election take place or that, absent an agreement already negotiated, it has no duty to bargain.

A more difficult question now on the agenda at some 70 private institutions is whether an administration that has maintained contractual relations in the past with a faculty union should sever the relationship on completing present contractual obligations.

Here are some of the considerations that such administrations may find it advisable to weigh:

1. Does the institution have good reason to believe that its faculty can be viewed as "managerial" in line with the *Yeshiva* criteria? To miscalculate on this may lead to unfair labor practice charges under Sec. 8(a) of the National Labor Relations Act and prolonged litigation.

2. What has been the nature of past relationships with the faculty union? If they have been good and have contributed to stability and the systematic "handling of grievances with a minimum of grief," it may be desirable to continue dealing with it. This would be the case if there is danger that the union may be

supplanted by a more militant organization that will resort to strikes as a method of obtaining recognition.

To be sure, a union that cannot gain the protection of an NLRB certification would enter a strike with certain disadvantages. Its leaders and its participants could be subjected to discriminatory discharge, and the Board could not entertain an unfair labor practice charge. On the other hand, in most cases the Norris-LaGuardia Anti-Injunction Act would still serve effectively to bar a federal court order against the strike. The courts would undoubtedly hold that such a strike arises out of a "labor dispute" which is defined in the statute as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. . ."(Sec. 13(c))

3. How strong is the incumbent union, and what are likely to be the methods of retaliation to which the union will resort if its existence is thrown into question? If faculty does play as strong a managerial role as the Supreme Court describes at Yeshiva, it may very well be in a position to sabotage the institution by insisting on transferring the traditional collective bargaining issues – compensation, workload, etc. – to the governance machinery. The net effect might well be to disrupt the academic decision-making.

4. What is likely to be the effect on faculty morale? The elimination of collective bargaining on a campus that once practiced it may result in disgruntled faculty members who reduce their commitment and even seek appointments elsewhere. There is also the possibility that tenured faculty, less vulnerable to discipline and relying on the theme of academic freedom to which the minority opinion refers, may adopt an adversary stance towards the administration.

5. Does administration now have greater leverage at the bargaining table? Some institutions may feel that continuing to negotiate with the union is desirable because their hand has been strengthened at the bargaining table by the Supreme Court decision. Note that the decision has simply prohibited the NLRB from compelling bargaining; administrations *may* negotiate if they wish or may be compelled to do so by another arbitrament – the strike. In either case, however, the administration will not be under a legal mandate to "bargain in good faith," and may threaten to withdraw entirely if it is dissatisfied with the way negotiations are going.

6. What is the competitive situation? Even though this is a "buyer's market" for faculty recruiters, institutions must still consider the economic aspects involved in attracting good faculty. Note that the public institutions, being subject to state and local statutes, are not affected by the Supreme Court decision directly. This is so in 24 jurisdictions, and even if a drive begins now to repeal mandatory bargaining for faculty in the public institutions, it will take a long time before any change occurs – if change does come.

Meanwhile, the paradox of public employees being entitled to bargaining rights while faculty in the private institutions are denied them may well produce a widening gap in compensation, hours and working conditions. Already a number of the private institutions have been heard to complain that they are losing their best faculty to the public campuses.

Somewhere down the pike there may also be concern about the fact that the non-faculty personnel of the institution are untouched by the Supreme Court decision. As these employees continue to press, through their protected unions, for an even greater share of the tightening university budget, there may be further danger of a narrowing gap between the non-professionals and, at least, the lower levels of faculty in the private institutions.

Where Negotiations Continue

If the administration decides to continue dealing with the union even though it has the legal right to discontinue, two alternatives are possible: (1) the university may bargain as it did before, but with the awareness that the union's bargaining position has been weakened; or (2) it may insist on limiting the scope of bargaining without any fear of NLRB intervention.

Already an administrator in a Northeastern private university is quoted as saying that his Board of Trustees may seek to limit the subjects of negotiation to salary and related economic issues. "We could recognize the union as a business agency but refuse to negotiate managerial matters like the election of department chairmen," he said.

This raises an interesting aspect of the change wrought by the Supreme Court decision. Because it holds that the faculty in private institutions are managerial, the Court withdraws *all* subjects from mandatory bargaining. State Public Employment Relations Boards, however, have generally followed another course. Because they consider faculty to be employees with bargaining rights, the PERBs have tended to rule that the unions may compel bargaining on "wages, hours and other terms and conditions of employment," but may not demand bargaining on topics traditionally left to the governance machinery and viewed as educational decisions – e.g., teacher evaluation procedures, participation of faculty in budget formulation, fixing student contact time. It is possible that the *Yeshiva* decision henceforth may have an indirect effect on the thinking of PERBs in deciding scope-of-bargaining issues.

Impact on the Public Institutions

The *Yeshiva* decision, of course, does not alter the legal status of bargaining in the more than 300 institutions that deal with faculty unions and that operate under approximately 250 separate contracts. But in some states that are in the midst of considering legislation authorizing faculty bargaining in public institutions, like Ohio and Wisconsin, the Supreme Court decision is likely to slow down, if not defeat, the effort. The argument will be that if the faculty in private institutions are really managerial, so too are faculty in state universities and college systems.

Indeed, at this point an anomaly has been created: for the first time, employees in public institutions are being accorded greater bargaining rights than employees of private institutions. One can expect a strong movement for revision or even repeal of legislation giving Public Employment Boards powers over faculty in state and local colleges similar to those formerly exercised by NLRB over faculty in the private institutions.

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Such legislative action, however, would take considerable time and may not be successful. The courts may be immune to pressure from organized groups; the justices do not have to stand for reelection. But legislators may not be eager to offend a highly articulate, well organized group of educators, especially those with ties to local labor organizations.

One immediate effect of the Supreme Court decision on the public institutions is that the PERBs in the various jurisdictions may be forced to alter their policies on unit determination. By and large, the state and local agencies have tended to follow the lead of the NLRB and the federal courts. It is possible that categories once included in the bargaining unit – for example, chairpersons – may now be excluded. So, too, there may be more fragmentation of units, with agencies more willing to establish separate units for non-tenured faculty and part-timers. Similarly, in the private institutions, such fragmentation may produce units of adjuncts and the lower ranks like instructors and lecturers, who under the governance system have no voice or vote on personnel or policy matters.

Impact on the Unions

The decision is obviously a heavy blow to faculty unionization, and has been recognized as such by the three leading organizations – the American Association of University Professors, the American Federation of Teachers (AFL-CIO), and the National Education Association. To be sure, the union at Yeshiva was unaffiliated, but the Court's ruling affects all.

One spokesman for AAUP thinks the decision may ultimately redound to its benefit in that faculty will again have to turn to an organization that is primarily a "professional association," the role originally played by AAUP before its rivals forced it to take up the bargaining challenge. But it would be a mistake to assume that the phenomenon of faculty unionization has run its course. The national unions have a strong base, and the independents may now feel greater pressure to affiliate. The *New York Times* quite correctly headlines a section of its report on the decision: "Death Threats Are Premature."

How deeply the individual faculty unions have been affected by the *Yeshiva* decision is spelled out in Table II, which shows the number of contracts they have at stake. It is almost a certainty that the three national organizations have sufficient political clout to get Congress at least to consider the kind of amendments to the NLRB that the health care industry achieved in 1974, which brought both the professional and non-professional hospital personnel clearly within the confines of the Act.

How the faculty organizations decide to fight back remains to be seen. It is possible that they may forget their long-standing differences to carry on a joint campaign for new federal legislation and to defend existing state legislation granting bargaining rights. It is not wholly inconceivable that the new situation may have the same effect on them as the Taft-Hartley amendments had in bringing about the unification of the AFL-CIO.

TABLE III

FACULTY CONTRACTS AND BARGAINING AGENTS IN PRIVATE INSTITUTIONS

Institutions (by State)	2/4 Year	Bargaining Agent	Year Current Agent Elected or Recognized	Year Initial Contract Signed*
CALIFORNIA				
Claremont Colleges	4	Indep.	n.a.	1972
University of San Francisco	4	Indep.	1975	1976
University of San Francisco Law School	4	Indep.	1973	—
COLORADO				
Colorado Women's College	4	AAUP	1979	—
Loretto Heights College	4	NEA	1972	1973
Regis College	4	AAUP	1973	1973
CONNECTICUT				
Mitchell College	2	AFT	1975	1975
Post College	4	AAUP	1978	1979
Quinnipiac College	4	AFT	1975	1975
University of Bridgeport	4	AAUP	1974	1974
University of New Haven	4	AFT	1979	1976
DISTRICT OF COLUMBIA				
Antioch College School of Law	4	AFT	1976	1976
Catholic University of America Law School	4	Indep.	1977	—
Mount Vernon College	4	AAUP	1977	—
FLORIDA				
Florida Memorial College	4	UFF/AFT	1979	—
Saint Leo College	4	UFF/AFT	1979	1978
ILLINOIS				
Central YMCA Community College	2	AFT	1976	1977
Kendall College	2	AFT	1976	—
IOWA				
College of Osteopathic Medicine—Surgery	4	AFT	1975	1976
University of Dubuque	4	NEA	1973	1973
University of Dubuque Seminary	4	NEA	1973	1974
MAINE				
Nasson College	4	AFT	1977	1979

* A blank in this column means that no contract has been signed, according to available information.

Institutions (by State)	2/4 Year	Bargaining Agent	Year Current Agent Elected or Recognized	Year Initial Contract Signed*
MASSACHUSETTS				
Becker Junior College	2	AFT	1974	1975
Boston University	4	AAUP	1975	1979
Curry College	4	AAUP	1979	—
Emerson College	4	AAUP	1975	1976
Endicott College	2	NEA	1973	1974
Laboure Junior College	2	NEA	1975	1979
Wentworth Institute of Technology	4	AFT	1973	1976
MICHIGAN				
Adrian College	4	NEA	1975	1977
Detroit College of Business	4	NEA	1973	1971
Detroit Institute of Technology	4	NEA	1977	1979
Shaw College at Detroit	4	NEA	1975	1980
University of Detroit	4	NEA	1975	1977
MISSOURI				
Cottey College	2	AFT	1976	1977
Park College	4	AFT	1976	1977
Stephens College	4	AFT	1979	—
NEW HAMPSHIRE				
Franklin Pierce College	4	AFT	1974	1974
NEW JERSEY				
Bloomfield College	4	AAUP	1973	1975
Fairleigh Dickinson University	2/4	AAUP	1974	1975
Monmouth College	4	AAUP	1978	1971
Rider College	4	AAUP	1973	1974
Stevens Institute of Technology	4	AAUP	1976	1977
Union College	2	AAUP	1974	1975
NEW MEXICO				
University of Albuquerque	4	AFT	1979	—

* A blank in this column means that no contract has been signed, according to available information.

Institutions (by State)	2/4 Year	Bargaining Agent	Year Current Agent Elected or Recognized	Year Initial Contract Signed*
NEW YORK				
Adelphi University	4	AAUP	1972	1973
Bard College	4	AAUP	1972	1973
Cooper Union	4	AFT	1976	1978
Daemon College	4	AAUP	1979	—
Dowling College	4	NYSUT/AFT	1978	1979
D'Youville College	4	AAUP	1976	1977
Fordham University Law School	4	Indep.	1971	—
Hofstra University	4	AAUP	1973	1974
Ithaca College	4	NYSUT/AFT	1978	—
Long Island University				
Brooklyn Center	4	AFT	1976	1972
College of Pharmacy	4	AAUP	1978	1979
Long Island University				
C.W. Post Center	4	AFT	1976	1975
Adjunct Faculty	4	NEA	1978	1979
Long Island University				
Southampton Center	4	AFT	1976	1974
Marymount College	4	AAUP	1976	1977
New York Institute of Technology	4	AAUP	1970	1971
New York University Law School	4	Indep.	1973	—
Niagara University	4	Indep.	1975	1979
Polytechnic Institute of New York	4	AAUP	1971	1973
Pratt Institute	4	AFT	1976	1972
St. John's University	4	AAUP/Indep.	1970	1970
Syracuse University Law School	4	Indep.	1973	—
Taylor Business Institute	2	AFT	1969	1970
Trocaire College	2	Indep.	1974	—
Utica College of Syracuse University	4	AAUP	1976	1977
Wagner College	4	AFT	1979	1974
Yeshiva University	4	Indep.	1977	—
OHIO				
Ashland College	4	AAUP	1972	1972
Dyke College	4	AFT	1975	1976
Ohio Northern University	4	NEA	1979	—
OREGON				
Western States Chiropractic College	2	Indep.	n.a.	n.a.

* A blank in this column means that no contract has been signed, according to available information.

Institutions (by State)	2/4 Year	Bargaining Agent	Year Current Agent Elected or Recognized	Year Initial Contract Signed*
PENNSYLVANIA				
Moore College of Art	4	AFT	1971	1971
Robert Morris College	4	AFT	1974	1975
Spring Garden College	4	AFT	1979	—
University of Scranton	4	Indep.	n.a.	1974
RHODE ISLAND				
Bryant College of Business Administration	4	AFT	1967	1967
Rhode Island School of Design	4	NEA	1978	1979
Roger Williams College	4	NEA	1972	1973
SOUTH DAKOTA				
National College of Business	4	NEA	1976	1977
VERMONT				
Goddard College	4	AFT	1975	1976
Graduate Faculty	4	AFT	1978	1979
VIRGINIA				
Marymount College of Virginia	4	NEA	1975	1975
WEST VIRGINIA				
Salem College	4	NEA	1979	—
WISCONSIN				
Northland College	4	Indep.	1975	1979

* A blank in this column means that no contract has been signed, according to available information.

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6. THE LEGAL ENVIRONMENT IN THE EIGHTIES — THE AGENCY SHOP

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Prognostication is not an easy art. However, I will attempt to look forward and make some personal observations on what I think may occur in the next decade in collective bargaining in higher education. However, I warn you at the outset, as one noted labor negotiator has stated in the past, "The difference between prognostication and informed judgment is about $1,000 a day."

In order to look forward as to the state of the agency shop, we must first look behind us. Simply defined, an agency shop fee is a fee required of an employee in a bargaining unit, to be paid to the union representing that unit in an amount equal to the normal dues or assessments required by the union of its members. There are several reasons why agency shop fees have been supported. First, all employees in the unit should share in the burdens of the cost of collective bargaining. After all, the union representing those employees, by law, must accord each and every member of the unit – regardless of his membership in the union – a duty of fair representation. The "Free Rider" should be eliminated – that is, an individual in the unit who benefits from an agreement which is bargained by the union should not receive those benefits without paying the administrative costs to the union in achieving them.

Secondly, the agency shop fee provides a sound financial base for the union to provide its services to all the employees of the unit to whom it owes its duty of fair representation. And third, it is to the interest of the employer – and in the public sector, to the public – that there be stability in labor relations between the union and the employer. This stability is supposed to come from the knowledge that the union is fiscally solvent and is not subject to a continued threat of challenge by another union.

History of the Agency Shop

The concept of agency shop and its existence is not of recent vintage. Under the Federal Railway Labor Act employers and unions were provided with the opportunity to negotiate a union shop provision. Back in 1956, the United States Supreme Court found that a union shop agreement did not violate the First or Fifth Amendments of the Constitution. *(Railway Employees' Department v. Hanson, 351 U.S. 225)* However, this was a union shop arrangement in the private sector, and one which was permissive – that is, negotiable between the parties.

In that case, the Supreme Court clearly expressed no opinion on whether union shop dues could be used to support political or ideological purposes unrelated to collective bargaining. The Court simply viewed the union shop fee as financial support required for the union to perform its work in the area of collective bargaining. One might analogize to the requirement that each of us

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pay income taxes each year – we do not benefit from every activity of the federal or state government which is supported by our tax money, but each of us must contribute to the support of government doing its work.

No long after that decision, the Supreme Court was faced with the issue of the use of union shop fees supporting political causes of the union which the union shop employee objected to. *(IAM v. Street, 367 U.S. 740 (1961))* In that case, the Supreme Court avoided the constitutional question (as it is wont to do if it can) and determined that the Railway Labor Act did not sanction the use of such money to support the political causes of the union if the employee objected to such use. The Court proposed two possible remedies: (1) an injunction against expenditure of such monies for political causes which were opposed by the complaining employee, or (2) restitution to that individual of his proportionate share of the money which the union expended for political purposes.

The Public Sector

All that has set the stage for the issue to ripen in the public sector. Whether the issue was raised in the context of a university or a civil service department, the question revolves around the First and Fifth Amendment rights of the employees. Regardless of the protests of faculty that academic freedom was being denied by their being forced to contribute to a union they did not support, or that supported views they did not support, the courts could find no difference between a faculty member making such a protest and a janitor making such a protest.

Initially, in those states where there were no statutory provisions for agency shop dues deduction, state courts had found that agency shop fees were prohibited. In New York State, the Taylor Law gave the right to every public employee to form, join or participate or refrain from so doing, in any employee organization. As a result, with no statutory authority, an agency shop fee could not be required.

Parenthetically, the provision of the right of a public employee to join or not join a union was viewed by New Jersey and other state courts as a "right-to-work" law. And we all must know how heartened the involved unions must have felt to find that the public sector collective bargaining laws for which they had fought were, in fact, right-to-work laws.

The issue of the constitutionality of an agency shop fee for a public employee who is not a member of a union came to a head in the *Abood* case. (*Abood v. Detroit Board of Education, 431 U.S. 209* (*1977*)) First, the Supreme Court found that there was no greater constitutional restraint on public employees being required to pay an agency shop fee than there was on private employees. Without going into the nuances of the *Abood* case, the Court held that a union could not constitutionally spend agency shop funds for the expression of political views, on behalf of political candidates or towards the advancement of other ideological causes not germane to its duties as a collective bargaining representative. Employees could be required to pay such fees only if they did not object to the union advancing these ideas and were not coerced into doing so against their will. The Court stated:

> There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.

The Court made clear that an employee did not have to establish the specific expenditures of the union to which he took exception. All the employee had to do was indicate that he or she desired to oppose the expenditure of agency shop monies for ideological expenditures of any sort that were unrelated to collective bargaining. To do otherwise would require the employee to reveal his or her beliefs publicly and to carry the burden of specifically monitoring the shifting expenditures of the union.

Present Status

This brings us to the crux of the matter for the '80s. There is no question that the time of agency shop fees for the public sector has come. Twenty-three (23) states have some form of union security in the public sector. This type of union security may involve an agency shop fee (a full dues equivalent payment), a fair share agreement, a proportionate payment of the union member's dues or the maintenance of membership provision (once becoming a member, the employee would be required to maintained that membership for a fixed period).

In *Abood*, it was clear that the Court viewed an internal review procedure by the union as an appropriate method to respond to objections by agency shop employees concerning the improper expenditure of this money. In the majority of the states in which an agency shop provision has been enacted into law, or provided by the common law, no refund procedure is required. *Abood* itself did not require a refund procedure.

In New York State, a refund procedure is required to be filed with the comptroller of the state in order for a union to be eligible to receive an agency shop fee equivalent to the dues paid by a member. However, the Taylor Law sets forth no standards for that refund procedure, nor clearly provides for the appropriate authority which would review such a procedure or a dispute arising from such a procedure. *(Eson, I, 11 PERB ¶3068)*

An agency shop employee may demand a return of any part of an agency shop fee deduction which represents that employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature, only incidentally related to terms and conditions of employment. New York requires that its employees have an agency shop fee deducted from their salaries. On the other hand, local government unions and local government employers are permitted to negotiate an agency shop clause as part of their contractual agreement.

Therefore, all State University of New York faculty and non-teaching professional staff (as well as non-professional staff) are required to pay an agency shop fee to a union which represents them if that union has a refund procedure on file with the comptroller.

As I will begin to outline now, it is my projection that agency shop fees in the public sector will cause much litigation within the next several years, both before administrative agencies and the courts. This process has started not only in New York, but in states such as Hawaii, Michigan, Wisconsin, and Connecticut, to name a few.

One of the first public sector cases to come to the fore is the *Eson* matter which the New York PERB reviewed. PERB, in its own wisdom, determined that it had jurisdiction to review the particulars of a refund procedure where an employee alleged that his right to refrain from participating in union activities was being violated. In simple terms, a faculty member at the State University of New York at Buffalo filed an improper practice charge against the incumbent union which represented the faculty and non-teaching professionals. The union refund procedure included a requirement that an employee who objected to the use of his agency shop fee could have such an objection resolved in binding arbitration. The costs of that binding arbitration were to be borne equally by the employee involved and the union.

Clearly, if any of you have any familiarity with the costs of arbitration today, and the cost of study days, it would be clear to you that if your dues were no more than $250 per year, there would be a negative influence on your desire to file an objection and have it finally determined. At least Professor Eson thought that. An so did PERB. *(Ibid., at 3106-7)*

Although PERB clearly supported the concept of a union providing for an independent review of the determination as to the amount of any refund which it granted, PERB found that the denial of any recourse other than binding arbitration to resolve this issue deprived Eson of an opportunity to have his rights fully litigated and imposed a substantial deterrent to him if he had to pay part of the costs of such a test.

Now, like most local unions, the union representing the State University faculty and staff is affiliated with both a state and national organization. Eson contended that not only did the university union have to show what expenditures it might have made which were objectionable to him, but also apply the refund procedure to the state and national affiliate to provide the employee a pro rata share of their expenditures for political or ideological activities only incidentally related to the terms and conditions of employment.

The union took a contrary position and stated that its payment to a state and national union was no different than buying services from any other organization. Once that money was paid for services rendered, the organization which received the money could not be held accountable for what it did with that money. PERB rejected that argument. Its position was simple:

> Insulation from the refund procedure of monies spent by (the affiliate) for political causes would, in effect, give to those organizations the right to force employees to support political causes to which they object. *(Eson II, 12 PERB ¶3117)*

Opening the Books

What does all this tell us? Over the next several years there should be some substantial litigation in the states where agency shop fees are required of public employees to determine the pro rata share of each employee of the dues expended for purposes not related to collective bargaining. In those determinations, it would appear that the books of state or national affiliates may be open for determination not only as to the local expenditure but also as to the state and national expenditure for these unrelated purposes. Opening these books for the public, or at least employee members of the unit, may raise significant questions in the minds of union leaders as to the worthwhile nature of the agency shop fee deduction. This issue certainly has not been raised to any extent at this point. However, it is not likely that you or I would be happy to have to open our check books, or account ledgers if we have any, for public consumption to determine how we spent our money. On the other hand, many people whom we know may be interested to find the facts. The agency shop refund procedure may be a way to do that. The question of the extent to which one may obtain access to these books will be open for future controversy and should cause some interesting litigation.

Professor Eson did not rest with this PERB determination. In son of Eson, or Eson II *(Ibid., at ¶ 3212)* he charged that the members of the union received a benefit which the agency shop members did not receive: various group life insurance policies.

The union made a good faith effort to provide these life insurance policies to all members of the unit regardless of membership in the union. However, the arcane tangle of the law worked against their efforts. The New York State Insurance Department advised that such insurance could not be provided to non-members of the union. Agency shop fee payers are by definition not members of the union, and therefore the university union terminated the insurance for agency shop fee payers. It did not decrease the agency shop fee required of the non-members, nor did it increase the dues of its members.

PERB found that the university union was "placing the non-member in the position of having to join the union or forego the substantial economic benefit for which he is paying." As a result the university union was coercing non-members into joining the union in order to achieve the same benefits as members of the union with no additional costs.

Future Questions

So a host of other questions are raised for future inquiry. What is an agency shop member's rights if a union sponsors social or other similar activities for members only? Is the benefit of allowing a dues paying member to vote on the approval of a collective bargaining agreement one which must be extended to an agency shop fee payer, since the purpose of the agency shop fee is intended solely and exclusively to provide that he or she is not a free rider and pays for the benefits derived from collective bargaining? And can we really determine what are political causes only incidentally related to collective bargaining? Such questions will be raised and will be difficult to answer.

For example, suppose a union goes to arbitration with a public employer on an issue as to whether the employees are not to lose leave credits for a day in which a massive blackout occurred and the city was effectively closed down. The state argues that it has a right to direct the employees not to work and to charge vacation credits for that day – a right clearly permitted under the collective bargaining agreement. Let us suppose further that an arbitrator rules in favor of the state and against the union. Then the union, in what management classically describes as the "end run," files a bill with the legislature to restore the leave credits and lobbies for it. Can an agency shop member complain that an inappropriate use of his or her money was made for a political purpose not related to collective bargaining, since clearly, it was ruled by an arbitrator that the state had the right and the authority to take the action? (Parenthetically, such a bill in reality was passed by a legislature and vetoed by the governor. The next step of the union involved was to use some of its monies to lobby the gubernatorial candidates to support its position.)

Defining "Political" Causes

Is it a political purpose unrelated to collective bargaining for a union to support political candidates who advocate collective bargaining law reform which opposing candidates either reject or have in the past, refused to support – for example, elimination of the strike penalties provided by law? Certainly the end product of the union is to provide its members, regardless of dues payer status, with the best benefits it can win under the collective bargaining law in existence.

In some states – New Jersey and Minnesota – there is a limitation of the agency shop dues payment to 85 percent of the members' dues. Suppose the union lobbies with the legislature for an increase of that percentage to the full equivalent of a member's dues. Clearly, the purpose of the union would be to provide enough money from an agency shop payer to support its efforts in collective bargaining. Would such an effort be a political cause only incidentally related to collective bargaining?

Let us look at some ideological causes which may be only incidentally related to collective negotiations. In the state of Washington it is statutorily provided that a religious objector may pay an equivalent fee to a charity rather than to a union where his or her religious tenets opposed union support. *(Washington, PECBA, Sec. 41.56.122(1))* Such a religious tenet must be more than a personal principle or a personal religion.

This raises more questions that will be tested in the next several years. In fact, not only ideological or religious issues are at stake, but political questions may be intermingled as well. If an employee has a moral, religious or even political view about the desirability of abortion, which does not square with the union's policy of negotiating a medical benefit plan that includes benefits for the payment for an abortion, is there a claim against the expenditure of the agency fee?

Issues of Stability

Let us look at one of the reasons for which agency shop fees are supported. An agency shop fee should bring stability to the labor relations between the employer and the union involved. Not only does the union now have a sound fiscal base from which to operate, but it also should be more secure in its ability to represent its employees and to have those employees respond to its interest. Translated, this means a probability of no challenge by another union.

From the employer's point of view such stability is important. Certainly the university campus would not want to deal with a new union every year, or every other year. Such instability would not only interfere with collective negotiations, but also would create great instability amongst the faculty and staff at the campus involved. Will agency shop fees bring this type of stability to the collective bargaining relationship?

Let us look at an example in New York State. One year after the agency shop fee became law, every employee organization representing employees in the ten State units was subject to challenge during a specified period by any other union that could muster 30 percent of the employees in the unit to sign a petition and file it with PERB. Remember that in New York all state employees are required to pay an agency shop fee. There are approximately 160,000 organized employees in the state. New York's bargaining units range from a size of several hundred to over 46,000. "Thar's a lot of gold in them thar hills." In that challenge period, after the enactment of the agency shop fee, six of the ten units were challenged by competing organizations. In fact, in New York, it was the largest number of challenges filed in any one year since the original statute.

Rather than provide stability to collective bargaining, the agency shop fee seemed to bring out of the woodwork other unions that suddenly realized there was a lot of money available. Certainly, in 1978, the circumstances were much better in New York than in any other states which had not yet enacted or provided for agency shop fee deductions.

Therefore I do not foresee that the agency shop fee will bring the type of stability one might expect it to bring in the private sector. The public sector at the moment seems to be resplendent with many independent employee organizations not affiliated with the AFL-CIO (and thereby not governed by the no-raid provisions of Article 20 of its constitution). The agency shop fee issue has created a battleground for NEA and the AFT to face off in educational circles. For example, the one court case in New York State where the issue of the agency shop refund procedure has been raised was initiated by a teacher in the Gates-Chili school district. The defendant union was the New York State United Teachers, an affiliate of the AFT. The attorney for plaintiff Warner was the chief legal counsel of the statewide NEA organization. Certainly the issue of agency shop fee was being used as a testing ground for a potential challenge against the incumbent union. *(Warner v. New York State United Teachers, 99 Misc. 2d 251 (1979))*

Potential for Litigation

This apparent instability which an agency shop fee has brought has been built into some other state laws. In California, if an agency shop fee is negotiated, the employees of the unit may require a ratification vote concerning agency shop provisions separately from a vote on the ratification of the agreement. While only dues paying members of the union can vote on the ratification of the agreement, all employees in the unit are eligible to vote for ratification of the agency shop or union security provision. One can clearly see that instability can be built in by a potential competing organization attempting to coalesce employees within the unit to object to the agency shop provisions negotiated by the incumbent union. Further, the public employer itself could require this separate vote. By doing this, the employer could attempt to "bust" the union or give aid and support to a competing organization. In Wisconsin, the employer can petition for a new referendum on the agency fee if it provides a 30 percent showing of interest. This could terminate the fee at most one year later.

There is no question that there will be successive litigation concerning the elements of a refund procedure, the types of expenditures that are permissible under an agency shop provision, and the extent to which an agency shop refund procedure coerces an employee to become a member of the organization. There certainly is no end to the questions about what are appropriate political causes more than incidentally related to collective bargaining.

As the Supreme Court pointed out in *Abood* the collective bargaining process in the public sector is a political process. The question of the extent to which politics can be supported by an agency shop fee, or *cannot* be supported by an agency shop fee, is one that has not yet been resolved by the courts, by administrative agencies, or by the statutes that have permitted these fees.

If you are permitted to negotiate an agency shop provision rather than mandated to do so, you will be faced with such questions before they are answered authoritatively. It will be your responsibility, whether employer or union, to determine the extent to which the refund procedure will be negotiated, the extent to which the fees may be used for certain purposes for members only, or for political or ideological purposes, and the amount of the fee. I caution you that, even when you answer these questions in your own negotiations, you have just raised them for future litigation. The agency shop fee is uncharted waters at this point.

The General Prospect

Let us turn our attention to some other forecasts for the legal environment in the '80s. I will make these remarks more general. The negotiations you may face in the 1980's – *Yeshiva* to the contrary notwithstanding – will reflect the economic environment of the past several years. The 1979 inflationary rate of 13.6 percent was the highest inflation rate since the end of World War II. Now the predictions for 1980 are that the inflation rate could go as high as 18 percent with a recessionary cycle facing us in the immediate future. With that in mind, and with the fact that Proposition 13 fever may inherit the earth as far as public employees are concerned, what are employee organizations of faculty, professional staff and other employees going to seek? The answer is simple: *more.*

Within the framework of desiring more – more salaries and more fringe benefits – the scope of negotiations will include heavy emphasis on job security clauses. There is no question that with the declining enrollment pattern – without an attempt to broaden the consumer segment of higher education – universities will face the prospect of retrenchment of academic as well as other programs. Employees will desire detailed retrenchment procedures. These procedures may include prohibitions against retrenchment at any time during the term of an agreement, or may call for retraining funds to assist retrenched employees to prepare for their future. On the other hand, the university itself will desire to retain its flexibility in determining which academic programs ought to continue and which academic programs should not.

Within that context, both public and private universities must, of necessity, seek additional governmental aid and support of the educational mission. In doing that, it will be no surprise that every attempt will be made to avoid the governmental interference which one may expect will be attached to any such funding. This political goal will also be a goal of university unions in negotiating their contracts.

New Forms of Arbitration

I think we should expect increasing requests for interest arbitration to resolve negotiating impasses between the university and the union representing its employees. As you know, there are different types of interest arbitration that may be used for this purpose. The most common is compulsory interest arbitration where an arbitrator can fashion whatever he determines to be the appropriate agreement between the parties and then impose it. I would predict that last-offer binding arbitration will be a method of interest arbitration that governmental bodies will seek to utilize in the hope of reducing the broad latitude that arbitrators now have in this area.

Last-offer binding arbitration (or "LOBA") is premised on the theory that the union and the employer will narrow their differences at the negotiating table to such an extent that a mutual agreement will be achieved without an impasse. Otherwise, one of the parties will be faced with an arbitrator selecting one of the two last best offers of the parties. The result would be that the losing side – the employer or the union – would have to explain to its constituency the reason why it did not succeed in either achieving an agreed-to contract or its last best offer.

Job Security

I would expect that university unions will seek job security in another way. Because of the economic insecurity over the next several years, unions will most likely demand that faculty members who are not renewed prior to a tenure decision be given the reasons for that non-renewal and be afforded some type of hearing to resolve that non-renewal. Because of this thrust, I expect that universities will attempt to provide more evaluatory techniques during the period of a faculty member's "probation," rather than have to provide reasons or any type of detailed review at the point of non-renewal.

Governance

Another thrust of job security, I think, will produce demands for more participation in university governance. Although this is a permissive area of negotiation, university employees will desire to play more of a role in the determination of their future and the future of the university. This goal, which certainly has been a goal of university unions in the past decade, may be a double-edged sword. Under *Yeshiva*, academic employees under certain circumstances have been found to be managerial in nature and not employees. Therefore, under the national labor relations act, the academic employees at Yeshiva could not compel the university to bargain with their union.

The irony is that any thrust for shared authority in decision-making at the university level could result in determinations by public sector employee relations boards that faculty, in fact, are managerial or supervisory and, therefore, not eligible to organize under that law. (I would point out that *Yeshiva* could be undermined should the National Labor Relations Act be amended to clearly provide for collective bargaining rights for academic employees at universities.) Therefore, should the danger of more shared authority become evident to university unions, the tendency by both university management and unions might be to move more toward the industrial notion of employee relations. In effect, that would mean the creation of a clear demarcation between management at the university and the employees who are faculty and professional staff. This area of collective negotiations and higher education – assuming there is any in the future – will be interesting to watch and will create many internal tensions at university campuses. For, as Justice Brennan said in *Yeshiva*, if the faculty were so happy in their managerial role, why did they vote for the union?

Legislative Prospects

One of the questions asked in the brochure which announced this conference is "Will state legislation limit or expand faculty protection in the 1980's?" Last year, the New York State legislature passed a bill which provided for reasons to be given to certain academic and professional employees in the state university upon their non-renewal prior to tenure decision. This act was vetoed by the governor, partially on the basis that such matters were the subject of collective negotiations and should not be enacted in an "end run" around the bargaining table.

The answer to the question posed is both simple and difficult: it brings us back to the question of the agency shop fee and its uses. There is no question in my mind that the university unions, in the public sector particularly, will seek legislation for further protection of their membership which has not been achieved at the bargaining table, or which *cannot* be achieved at the bargaining table. Collective bargaining is a political process. The legislature is composed of individuals who must at some point run again for office. There is no question that these individuals depend upon contributions not only from the general public (or corporate public) but also from the unions that represent those employees. The legislature will be faced with those choices proposed by lobbying unions and opposed by lobbying universities and, perhaps, a public sensitive to the Proposition 13 syndrome that too much money is being collected from their salaries to support government programs.

As a footnote in *Yeshiva* pointed out, the bargaining unit requested by the faculty was not appropriate, but an appropriate unit of non-tenured faculty might exist. Although the *Yeshiva* decision may mean that there is no future for collective bargaining in higher education, I should note that the *Yeshiva* decision is only the beginning of questions to be raised over the next decade. Should academic and professional employees of a university be permitted to organize? Should federal and state legislation make that right clear? Under present federal law, should non-tenured academic and professional staff be permitted to organize in a bargaining unit? Will public universities in states where there are public employee collective bargaining laws seek to have their employee relations boards establish the managerial or supervisory nature of academic employees to foreclose bargaining rights in the public sector?

Court decisions rarely lay an issue to rest. *Yeshiva* will be debated not only in the university sector, but also in other professions. The legal environment in the '80s in the area of *Yeshiva* is not ending; it is just beginning.

I promised no informed judgments at the outset of my remarks and can only close with the comment of Paul Valery: "The trouble with our times is that the future is not what it used to be."

7. COLLECTIVE BARGAINING IN HIGHER EDUCATION: EXPECTATIONS AND REALITIES — A UNIVERSITY PRESIDENT'S VIEWPOINT

John Silber
President, Boston University

The topic that we are meeting about today is as critical to higher education as any we might choose, but I don't think there is any area in higher education in which the public is more genuinely confused or in which the faculty and the administration are more genuinely confused than the issue about which we are meeting.

The confusion that abounds is, first of all, a derivative from the complexity of the issues themselves. But secondly, it is derivative from natural human tendencies to oversimplify and then from lately discovered tendencies clarified by Saul Alinsky with regard to how one might manipulate large groups of people and how one might manipulate the public. To point out that *Rules for Radicals* by Saul Alinsky is now a textbook in common use by the faculties and administrations of many campuses all over the United States, in addition to being in daily use by student organizations, is merely to speak the truth. It has been a well selling document for no other reason than that it is exceedingly useful. One need not be a particular genius to figure out how to attract the attention of the media and how to distort an issue for the perspective of one or another partisan if one has read the book. You personalize the issue and in the process of personalizing the issue, one can release emotions on the subject that would be incapable of being aroused by some objective discussion of the complex social, economic and historical issues that were actually involved.

Such is the case with regard to collective bargaining in higher education. I don't think there is any question about the deep perplexity and concern among the faculty of American universities today. Indeed, our faculties would have to be unintelligent if they were not concerned, if they were not filled with anxiety, if they were not overcome by a sense of foreboding. We are living in a period in which our culture is coming apart at the seams all around us. We are very likely to experience what it means suddenly to become a socond- or a third-rate power in the international scene and that thought in the background is enough to increase the anxiety level and to dampen the enthusiasm and the normal optimism of any intelligent person. It also has its effect on our students who don't know if they are going to be drafted, if they are going to be involved in a war.

All of us anticipate, if we have any brains at all, that the standard of living to which we've become accustomed over the last twenty-five years is not going to last. That decline in the standard of living is going to happen without regard to the exacerbation of that decline within the context of higher education, that it's a result of our forgetting how to have children for a certain period of time and the resulting decline in the number of live births. We have declined, from 1961, when we had 4.3 million live births to 1974 when we had only 3.2 million live births – a decline of 1.1 million live births. We introduced demographic factors that mean that there is going to be a depression in higher education beginning now and continuing for the next ten to fifteen years no matter what any of us do.

Prospects of Decline

We have expanded higher education over the last twenty-five years. We have increased the number of Ph.D.s produced to almost 50,000 a year. The need for Ph.D.s in the future is no more than 20,000 a year and that oversupply means that a younger generation of scholars are not going to find work in the areas in which they've studied. The expansion of employment from '65 to '70 means that there is virtually a five-year moratorium on the appointment of these young scholars. All of this adds up to confusion, to concern, to disappointment in higher education. It also adds up to the fact that things are going to get much worse before they get better.

Now in that context, there is not any reason on earth why the faculties and universities and colleges of the United States should not be upset. Add to this, the ineptitude, whether avoidable or unavoidable, that we have seen nationally over the past few years. Who would have thought even five years ago that we would have an inflation rate approaching 20 percent in the United States? Or that we would have interest rates at banks in excess of 20 percent? Up until about a year and a half ago, one could be sent to jail in Texas for charging more than 10 percent on a loan. The usury laws had to be repealed or to be set aside by national legislation in order to continue the banking services in a state like Texas where the populist movement had put a ceiling on interest rates.

This deterioration of our economic situation nationally is a result in part, but only in part, of the energy crisis and due in very large part to the growing demand for more. The insatiability of the American population, of workers and employees and professional people throughout America, is largely responsible. Now in that situation, for somebody to decide that the reason that we have trouble at Boston University is because of a controversial president is to talk nonsense. I have been accused of being arrogant, but on my worst and most arrogant day, I would not aspire to take credit for the problems, nationally and internationally, that give rise to strikers. We have a complex historical and economic, international, military crisis facing this country and all the signals are black – all the signals look as if something unfortunate lies ahead of us. In this situation, it won't do to try to point one's finger and say the problem is the leadership of the AAUP or the problem is the leadership of Boston University, or two or three individuals are simply out of line and if you change them, somehow you are going to solve the problem.

A Changing Professoriate

We have had a transformation of the professoriate in the United States over this century that has been so profound that the professoriate today has very little in common, in terms of a personality profile, with the professoriate of thirty years ago. This generalization applies exceedingly well to the large state universities and private universities and colleges. It applies less well to the small liberal arts colleges which rarely exceed 2,500 students in number.

Historically, from 1910 to 1950, the average full professor in the United States earned approximately $17,500.00 in 1979 dollars. Fourteen thousand was the median income in the United States – so that full professors, persons who had gone to the top of their profession in that period from 1910 to 1950 did only slight better than 50 percent of their colleagues and worse than the other 50 percent. By 1960, the salary had jumped to $20,000.00 and by that time we had an extraordinary increase in fringe benefits – not merely from an enrichment of social security but from TIAA-CREF – benefits scarcely known in the earlier period of American higher education. Total compensation by 1960, on the average, was up to $25,000.00. By 1970, the average salary of a full professor was at $23,000.00 and the total compensation was almost $30,000.00. By 1979, the average salary for a full professor in the United States was $26,000.00 (all in 1979 dollars) and the total compensation was approximately $35,000.00. It is estimated by the Journal of Higher Education that the average full professor earns about 20 percent of his salary in terms of overtime, overload or consulting work or summer work so that it is substantially higher than the figures just mentioned.

This means that the average full professor, in 1979, ranked above about 90 percent of his fellow-Americans and below about 10 percent – an extraordinary change in just half a century. If we break down the figures by universities, colleges and two-year community colleges, we find the average full professor, at a full-time university, receives about $32,000.00 in 1979; $25,000.00 in the four-year colleges; and $24,000.00 in the junior colleges. The professor in the university ranks at about the top 8 percent of the working people of America, ahead of 92 percent; in the four-year college, at about 12 percent, ranking ahead of 88 percent; and the junior college full professor ahead of 85 percent of his fellow Americans and behind 15.

This situation, in which we have seen such extraordinary improvement, has very definitely changed the pattern of motivation among the professoriate. What they're concerned about is not merely the exploration of the subject in which they have decided they are most interested but also many questions that would be commonly associated with those who have gone into business – how to get ahead in the world, the kind of motivation that brought men and women into a variety of professions in that earlier period. That change in motivation has to be felt in the way life at the university campus goes on. Now in this period of great improvement, of continual optimism, the standard of living was rising relative to other people, giving the double satisfaction of making more oneself and seeing one outdistance his competitors. All of that is rapidly coming to an end. But at the present time, when a full professor ranks ahead, on the average, of about 90 percent of his fellow Americans, it makes no sense to talk in terms of the traditional language of trade unionism about exploitation when one is making more than 90 percent of his fellow-Americans and when Americans have the highest standard of living of any large country in the history of the world, at any time in history. If the professors and the universities and colleges in America are being exploited, then the word exploited loses its meaning because we're all exploited. There is exploitation everywhere. There is nothing but exploitation, and a word loses its meaning when it's applied to everything.

Secondly, alienation – that other characteristic basis for trade unionism – is lacking in higher education. How does a professor of English become alienated if all he is asked to do is to study, teach and write in that area of English literature in which he said he was interested? Now if he is alienated, the solution should be found at the tender hands of a psychiatrist and not through a trade union. The point about getting one's act together so that one is no longer alienated when he is doing the work to which he has dedicated his life by his own free choice is a matter that doesn't come under the purview of serious trade unionists.

Attitude Towards Unions

The reason I raise these issues is that no statement made about me or about Boston University is more false and misleading than that Boston University is anti-union or that I am anti-union. I was so fascinated with the American Federation of Musicians and so admiring of Petrillo that I remember when I was a young man before I ever began to smoke I would recommend only Philip Morris because it was the only brand of cigarette made in a union shop. As young musicians of that time, one of the things we were most proud of was our association with the Federation of Musicians and, still as teenagers, with the union movement. That attitude has extended to a recognition of the very important contributions that have been made by unions to the betterment of mankind, not merely in this country, but elsewhere in the world. At the University of Texas, I was associated supportively with Cesar Chavez's movement of farm workers. At Boston University we have had unions for many years and we have had very peaceful relationships with them until very recently, interrupted only for brief periods of time. We had three strikes in the last year and a half – all were settled within one week – and every one was settled on the terms that were offered by the administration of Boston University before the strike was called, which means that the offer made by the University must not have been all that far off.

At the same time that we are, and that I am personally, dedicated to and supportive of the trade union movement, it seems to me perfectly consistent and perfectly reasonable to say that there is something mistaken about the importation of the trade union approach to higher education. For one thing, professors are hired for being, not merely among the most intelligent and most educated but also for being among the most articulate of human beings in the country. The idea that they need a shop steward in order to articulate their needs is counter-intuitive. They do not have such needs in order to express themselves.

Secondly, the diversity of performance in higher education is so great that individual assessment and individual merit considerations become of essential importance. It may be that putting a headlight on a Ford, or a Plymouth or a Chrysler automobile is more or less the same job no matter who does it. But teaching philosophy is not the same job. It is a different job depending upon the individual philosopher, and the same goes for history or for literature or for the sciences. The individual performance is a matter of very serious concern and an institution needs a way of responding individually to those concerns. That was the reasoning by Boston University, out of a concern for what I believe to be the cosmic forces about us – the national drift, the international drift, the historical drift, the economic deterioration, the demographic decline in young people, at a time when some of the faculty decided they needed a union at Boston University, or a minority of that faculty decided that they needed a union and gerrymandered the University in order to get a bargaining unit in which they could produce a majority in an election. The Board of Trustees of Boston University adopted a position as follows:

> In those parts of the University that may be unionized, the imposition of collective bargaining would transform collegial governance to the industrial model of operation. Faculty and administration become labor and management, and every existing condition of employment, wages, hours, leaves, sabbaticals, teaching loads and tenure are subject to the give and take, demands and counter-demands of contract negotiations between the representatives of management and the agent of the bargaining unit. The dignity and mutual respect of the collegial model have been reflected in the language of academic governance. For faculty and administration are words that traditionally promote mutual interest so that faculty members have moved in and out of administrative positions without loss of personal dignity or place. Even professors who have never held administrative offices have shared in administration through their participation in the recruitment and evaluation of colleagues and all faculty have participated in administration through the development of courses and curricula.

The Yeshiva Decision

Now these last few sentences taken from a document prepared by the administration and adopted by the Board of Trustees at Boston University in April 1975 sound extremely familiar, I realize, because it is very much language that has turned up in the *Yeshiva* decision when the Supreme Court held that the National Labor Relations Board was wrong in having failed to examine the facts to determine what the Yeshiva faculty actually were engaged in doing. The Court then went on to note in the body of its decision that the controlling consideration in this case is that the faculty of Yeshiva University as a matter of fact exercised authority which, in any other context, unquestionably would have been managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled and to whom they will be taught. They debate and determine teaching methods, grading policy and matriculation standards. They effectively decide which students will be admitted, retained and graduated, etc. To the extent that the industrial model applies, the faculty determines, within each school, the product to be produced, the terms upon which it will be offered and the customers who will be served.

That essentially is the position taken by the majority and since they have said that this is a matter of fact and since these are the facts of the *Yeshiva* case as they reviewed that case, it would indicate that the faculty of Yeshiva are managerial. They may also be supervisory or they may not be. The Court avoided that question. But in any case, they are clearly managerial and for that reason, do not fall within the purview of the NLRA.

The dissent, written by Mr. Justice Brennan, is really not incompatible with this. He and those justices who joined him in the dissent certainly agree on the facts and the majority decision says that this is an issue not merely of law but of fact. So Justice Brennan says, "Education has become 'big business,' and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration [note that: autonomous administration], which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization."

Now on that basis, if that is in fact the situation – I know of no university in which it is the fact – but if it were, then it would seem to me quite clear that the minority decision should prevail. And I would suppose that wherever a group of faculty can demonstrate that the administration is in effect autonomous, they will certainly win the right to bargain under the provisions of the NLRA. I have no doubt about that. On the other hand, I think that faculties will look hard and long to find autonomous administrations. What I also suspect is that if they succeed in winning the right to collective bargaining under NLRA on the basis of such fact-finding, the administration and the trustees will, in turn, insist that they shall assume the prerogative of an autonomous administration now that they have been declared to have it. Whereas before, they would have recognized that they didn't have it at all, that they operated under a collegial form of governance in which the power in the university is incredibly widely diffused among all members.

Faculty Authority

Justice Brennan goes on to find other factual conclusions. "The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decision-making process."

Now I didn't find any evidence in the minority opinion of a factual sort to support that, and I submit that it is completely false historically to say there has been an erosion of the faculty's role in the university's decision-making process. What one will find by contrast is that in the last thirty years, there has been a steady increase in the faculty's participation in the decision-making process in universities. That is certainly the case at Boston University. I have taken great pains to ask anyone to cite a single example of pre-emption of a previously existing faculty right by the administration of Boston University since I came there. No one has come forward with a single example to this very day, and let's put out the challenge again. Let's hear it from those who know about it: where was the erosion of authority?

But I do know something about the history of Boston University and it's very similar to the history of Columbia, Princeton, Yale and Harvard. Do you remember the names of college presidents such as Eliot and Woodrow Wilson and Angela at Yale and Nicholas Murray Butler at Columbia? When I am discussed in the context of arrogance and autocracy, surely somebody must have totally forgotten the name of Nicholas Murray Butler. As a matter of fact, when the disturbances occurred at Columbia in 1968 and the faculty met for the first time in many years, most of the faculty were amazed to discover that Butler wasn't still president because he was the last one who had been visible on that campus. No, Nicholas Murray Butler, it can be said, ran that show to a remarkably complete degree. Woodrow Wilson is still, among people over eighty, accused of having ruined Princeton. No survivors remain today who remember when Eliot was president at Harvard but I am sure that the changes he made in Harvard, which no president of Harvard could make today, must have been thought terrible by some, however excellent they may have been considered by others. Angela at Yale transformed Yale from a nice boys finishing school to a great university and he made dozens of enemies in the process of doing so.

President's Authority

But there was enormous power in the president's office – over departments to be created, schools to be created, positions to be created, positions to be terminated, and so forth. Coming to Boston University, my predecessor, three removed, was a man named Daniel Marsh who is largely responsible for putting Boston University together in a physical location on the Charles River. He had the facility of spinning a cane in the air and collecting money at the end of it like cotton candy, and in the process he also could charm Mayor Curry. He learned the value of visiting the Mayor when the Mayor was sick and in prison. Although Marsh was a Methodist Minister, when Curry got out he never forgot Father Marsh and as a consequence, he was willing to open and close streets at his beck and call. He closed St. Mary Street, which would have intersected our campus, at the request of Daniel Marsh and did so with such alacrity that he closed three blocks that Marsh didn't have in mind, and so he had to open them up again.

Such was the power of a president in those days and on two occasions in the 1930's, President Marsh called all of the faculty of Boston University together. The faculty was still small enough in those days so that all could be gathered into a room about this size, and he began to shed copious tears as he talked about Boston University, about his love for Boston University, and for the devoted faculty that made that institution possible. A very tall senior professor leaned down to talk to a young assistant professor and said, "Young man, where there is so much love, someone is about to be screwed." That turned out to be an accurate prediction because Danny Marsh, at the height of his peroration, in which he not only moved himself to tears but many people in the audience, announced that there was going to be a salary cut in order to keep Boston University from going bankrupt. Before the depression was through, he announced unilaterally, on the basis of his own decision without the help of any faculty committee, that salary would be cut again. That was the kind of power a president of a university had in what are sometimes referred to as the "good old days." But I think only those who are misled by nostalgia really believe it.

Faculty and Administration

As a matter of fact, since those days the role of the faculty in the administration of the university has continually increased. The first job offer I had as a brand new Ph.D. from Yale University was to Willamette College out in Oregon. I was sent a list of expectations, and that included a statement about my religious views, about my religious practices, about almost every aspect of my personal life. If I could sign in the proper column – which was probably "Yes" as opposed to "No" with my affirmation personally to all of those things – then there would be a sufficient character match with the administration's to justify my coming out for an interview. I never went to Oregon but it is interesting that this was a perfectly acceptable standard, and there are still a few, but very few, universities that apply those standards to this day.

In most places however, the erosion of expectations of the faculty has gone hand in hand with the substantial increase in the faculty's involvement in the decision-making process of the university. At Boston University, long before we had a chapter of the AAUP organized as a union, we had established, under this administration, a Faculty Budget Committee in which every budgetary document made use of by the administration was shared in detail with the faculty and in which the faculty had the opportunity to give whatever advice they might care to give with regard to those decisions. So, I don't see any evidence, any factual basis, for Brennan's insistence that there has been a deterioration of faculty authority. On the other hand, if there is a factual situation in which it could be proved, I should think that it might mean that the administration has become autonomous, in which case the NLRA would apply. However one reads the majority and the minority decisions in the *Yeshiva* case, I believe that they fit remarkably well together. Whether one goes with the majority or with the minority, there seems to be very little difference of opinion with regard to the legal principle. If the faculty are managers, if they have substantial managerial responsibility, and perhaps, though it has not yet been decided, if they have major supervisory responsibility, then it's quite clear they're not eligible to form unions. If, on the other hand, in a university there exists an autonomous administration that makes all the basic policy decisions and leaves the faculty with little more to decide than the content of their own courses and how they will go about teaching their courses, and the grading of their own students, then it would appear that the faculty do have the right to organize collectively and to join a labor union. Now, what I see happening is the either/or that was elaborated by the Board of Trustees at Boston University back in 1975 now stated as a matter of law by the Supreme Court of the United States. The faculty have now an either/or before them. They can decide to continue to share in the academic governance of the institution and forfeit their right to collective bargaining or they can eschew the administrative responsibilities that they now enjoy. But if they do not have such administrative functions, then they are eligible for collective bargaining. In the latter situation the administration clearly has the authority to make those managerial decisions that heretofore they have shared extensively with the faculty in terms of the design of curriculum, in terms of the focus of the program, in terms of the design of the product, in terms of the selection of the students, in terms of the evaluation, promotion of the faculty, and so on.

The Alternatives

I think that higher education in the United States can be sustained with integrity and with quality under either alternative. I don't hold the view that trade unionism will destroy quality higher education in the United States. I think mixed governance of the sort that we have in some places may very well do this. At Boston University, the AAUP insisted in their contract on across-the-board salary increases based on so many dollars – X number of dollars per Y years of service at Boston University. That meant that the largest single raise would go to an associate professor who had been an associate professor for thirty years, and anyone who knows his way around academia knows it's hard to remain an associate professor for thirty years. There has to be some lack of confidence in order to achieve that result. Well, the decision to put literally hundreds of thousands of very limited dollars at Boston University into the paycheck of some of the least effective members of the faculty would, if continued over a long period of time, have a serious deteriorating effect on Boston University. But it is our hope that in the further negotiations with AAUP, there will not be a repeat of that kind of demand because we believe that our sense of community and our sense of common interest are sufficient to overcome such a counter-productive determination.

Basically, I think we can work with unions or we can work without unions. But I think we will have a very great deal of difficulty in working with the mixed system, whether faculty reserve, on the one hand, the full right to participate in the governance of the University as long as it suits their fancy; and whenever it doesn't suit their fancy to reserve the right to declare themselves adversaries to the administration, to the students, and to the institution, and to pursue their own interests in a way that runs counter, perhaps, even to the survival of the institution. I think we need to accept this *Yeshiva* decision as a watershed decision bringing that either/or to the attention of the faculty; and then we will be able to cope with the consequences no matter which way the faculty decides. Whichever way they decide, I see no reason why we cannot maintain our civility, our sense of humor and our recognition that the survival of our institution, source of the livelihood of the faculty no less than the administration, requires maximum cooperation between faculty and administration under either a union aegis or without it.

8. RIGHTS ISSUES: A SCRAMBLE FOR POWER?

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The Problem

Professors and administrators have for many years asserted jurisdiction over similar rights, functions and duties. Thus, collective bargaining was superimposed on the dual power structure typical of organizations whose product is professional services, i.e., the professionals are the operation. Schools and hospitals are the main examples.[1]* In such organizations institutional values and the values of the professionals would appear to be almost identical. However, with the rise of the modern university in the early 1900's, new crafts appeared, the academic specialist and the professional administrator, and they quickly clashed over who would be the prime upholder of academic values and standards. This phenomenon might be described as a power struggle, although given the proclivities of the parties, perhaps it is better characterized as a power debate! Despite various problems the sharing of authority or collegiality generally has been accepted as a desirable institution. It is most typically found in research and doctoral level schools, but it is held as a model by all.

The speculation that collective bargaining would end collegiality and reduce professors to employees interested only in wages and working conditions remains unconfirmed despite its being repeated ad nauseum. More realistic and significant is the question of the faculty's use of collective bargaining as a vehicle for asserting jurisdiction over its traditional prerogatives by placing collegial rights, functions and duties in the agreement. Formerly, if both parties claimed a certain right, each one could take satisfaction in regarding itself as the legitimate owner. However, the written agreement inevitably changes this situation. Contracts spell out and assign rights. Would faculty members and administrators attempt to place their traditional rights in the agreement? If so, which ones would be emphasized? What kinds of variables would be associated with stronger or weaker faculty and administration voice?

Research Design

Although there is a voluminous body of literature predicting the consequences of academic bargaining, few studies involve an in-depth examination of the actual agreements. Instead, many are based on attitude surveys which often do not serve to predict subsequent events. While contract language also may lack connection with reality, it does represent the agreement created by the parties.

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*Footnotes for this paper will be found on p. 64.

In a dispute, the wording is the bottom line and of critical importance in the determinations of arbitrators, judges and labor boards.

To make what we felt would be a needed contribution to the study of academic bargaining, our research was designed to produce concrete data and permit systematic analysis. The basic data source was 63 agreements of four-year and 142 of two-year institutions, which constituted the total available population.[2] At the end of April, 1980, there were over 100 four-year and 200 two-year contracts, and we are in the process of analyzing this new group.

We chose for investigation seven crucial issues which are located at the center of power struggles in organized schools: management rights; two administrative issues: long-range planning and retrenchment; and four personnel issues: appointment, promotion, nonrenewal and tenure.

To measure the contractually-specified voice of faculty and administration in these areas, a new and complex system was developed for coding the agreements with regard to extent of assertion of faculty rights and extent of assertion of administration rights. After being completely read and analyzed, every agreement was coded for voice in each of the seven issues. The assigned number represented our assessment of a party's voice. A five-point scale was used with a "5" indicating very strong voice and a '1" signifying very little or none.

To explain the results produced by this analysis, our extent of assertion of faculty and administration rights measures were tested against a number of demographic and institutional variables. These were: size (faculty; student body), region (East, Midwest, Central and West), affiliation (public or private), bargaining agent (American Association of University Professors (AAUP), American Federation of Teachers (AFT), National Education Association (NEA), Independents and Mergers), and for the four-year sector, institutional type (research, doctoral, comprehensive, liberal arts and specialized).[3] The latter classification system provided us with a rough measure of institutional prestige.[4] Date for the two-year and four-year sectors were analyzed separately.[5]

The above are factors which have been associated in the literature and in the minds of participants with certain potential results in terms of bargaining outcomes and the treatment of rights issues. For instance, the four-year schools are regarded as being different from the two-year. In the two-year sector the administration traditionally has been the dominant force, while many four-year faculties possessed a substantial bundle of rights as managers prior to collective bargaining. Faculties in eastern schools or in public institutions often are described as more liberal or more rights-conscious than those in other sections of the country or in private institutions. Certain bargaining agents are thought to be more aggressive than others in pursuing rights issues, e.g., the AAUP. Faculty members in prestigious schools are thought to be uninterested in bargaining over rights issues, while those in lesser institutions will eagerly seek such language. Finally, predictions concerning the impact of faculty size are somewhat uncertain, but many hold that sheer numbers exert a positive pressure for contractually-asserted voice.

While an interview survey supplemented the contract analysis, the basic contribution of this research is the body of findings emerging from the analysis of such large group of agreements, one that comprised almost the entire universe.

The Findings

Extent of Faculty Assertion of Rights. Apparently, in these early stages of academic bargaining, many faculty associations were using the process as a means for incorporating existing governance mechanisms into the contract. This is illustrated by the attempt to specify traditional scholarly controls over appointment, promotion, nonrenewal and tenure. Overall, our analysis revealed rather moderate contractually-specified "inroads" into decision-making in the two administrative and four personnel areas. In the four-year sector the average score was 3 and in the two-year, 2.5, figures which suggest at most consultation rights with the final decision resting with the administration.

Extent of Administration Assertion of Rights. Administrators appeared to be joining faculty members in placing their traditional bundle of rights in the agreement. Management rights clauses were commonplace. They appeared in 92 percent of the four-year agreements and 85 percent of the two-year. Analysis of the data revealed results similar to those for the faculty. The scaled means for the management rights clause were 3.1 for the four-year agreements and 2.8 for the two-year. Eighteen percent of both the four-year and two-year contracts contained very strong management rights provisions which were assigned a code of 5.

Patterns of Faculty Voice. Going beyond the overall scores, our data revealed some interesting differences concerning contractual penetration in the various areas.

Administration. Voice in the two administrative areas, long-range planning and retrenchment, was generally weak, with the four-year means 2.3 and 2.7, respectively, and the two-year means 2.0 and 2.5. Still, long-range planning was mentioned widely. Sixty-five percent of the contracts contained some language, most of it providing for rights to be informed (code 2) or consulted (code 3). Clearly, a beach-head had been established.

Possibly because the second administrative issue, retrenchment, has a direct effect on faculty employment, it appeared in a somewhat larger proportion of the agreements, 72 percent. There seemed to be an active two-year push on this matter. Three agreements accorded very strong faculty voice. Considering the traditional lack of two-year faculty influence in administrative decisions, the clauses concerning retrenchment may represent a significant change.

Personnel. Faculty members, especially those in four-year colleges, have a long tradition of rights in the personnel area. One would anticipate contractual affirmation of faculty rights greater than that for the two administrative decisions, and this was the case. For the four-year agreements, the proportions providing for very strong faculty voice were: tenure, 37 percent; promotion, 27 percent; appointment, 18 percent; and nonrenewal, 11 percent. The two-year proportions were considerably smaller, 13 percent for promotion and about 8 percent for the other three areas.

Four-year faculties attained their largest voice with regard to tenure, which earned 3.5, the highest mean score for any area. By way of contrast, the two-year sector was weakest in this area, with a mean score of 2.4. Promotion ranked second in the four-year schools, with 3.4, and it also registered the strongest of the considerably smaller two-year gains, scoring 2.8.

In general, faculty associations appeared to emphasize and to be best able to control personnel decisions concerning advancement on the job. The administration retained more fully its rights to make appointment and nonrenewal decisions for which the four-year sector scored 3.0 and 3.1, respectively, and the two-year, 2.5 and 2.6.

There was no evidence that faculty associations were trading off one right in the six administrative and personnel areas for another. Our data analysis indicated, at a highly significant level, that when an association attained strong rights guarantees, it won them across the board. Conversely, a faculty group that lacked strong rights in one area was quite certain to be uniformly weak.

Institutional and Demographic Variables

Size. Size proved to be the best explanatory variable, especially in the two-year sector where it was significantly and positively related to extent of faculty voice in long-range planning, promotion, appointment and tenure. Sheer numbers apparently contributed to the gaining of rights this sector generally lacked. A similar relationship applied only to appointment decisions in the four-year sector. This was the weakest of the four personnel areas in this sector, and again, sheer numbers seemed to make a difference.

Interestingly, size was significantly and inversely related to strength of assertion of management rights in both sectors. In smaller schools, faculties probably were more ready to accept such language, and administrators were more eager to seek it, perhaps because they viewed collective bargaining as a personal threat.

Region. Region ranked second in importance. It was strongly associated with performance in the four-year sector regarding faculty voice in appointment, non-renewal and tenure, but in two-year schools, only with voice in promotion decisions. The East, which had 52 percent of all bargaining relations, was clearly in the lead in assertion of faculty rights. The Midwest, which ranked second with 31 percent, had more modest achievements in faculty voice and the strongest assertion of management rights.

Both regions were well matched with regard to distribution of size of institution. However, the East had 68 percent of the more assertive organized four-year sector, as contrasted to only 19 percent for the Midwest. Seventy-five percent of all organized private schools also were in the East.

The two regions had rather similar proportions of the total two-year bargaining sector, 44 percent for the East and 36 percent for the Midwest. However, even in this case, the two-year schools in the Midwest ranked well below those in the East in assertion of faculty voice.

Affiliation. Affiliation was related less clearly to administration and faculty assertion of rights. The public sector, which certainly was stronger in terms of numbers organized (169 to 36), did not significantly exceed the largely eastern-based private sector in terms of rights assertion. In fact, there was some reverse evidence. In the four-year sector, for which the contracts were evenly divided between public and private institutions, the private had significantly greater voice in the retrenchment decision. The two-year sector is comprised almost entirely of public schools, but the tiny group of five private institutions, all on the east coast, scored remarkably high in assertion of both faculty and administration rights.

Institutional Type. There is a great deal of interest in institutional type as an explanatory variable in the four-year sector. Most striking was the highly significant relationship between institutional type and assertion of management rights. Very strong language was found in the comprehensive universities and the specialized schools, which often are said to deviate most from the collegial model for academic relationships. On the other hand, management rights statements were quite weak in the research, doctoral and liberal arts schools, commonly regarded as the heartland of collegiality.

In the administrative areas, agreements in the less prestigious comprehensive universities provided the strongest faculty voice, possibly a reflection of professorial concern about the future in these upwardly mobile but often insecure institutions. In general, both comprehensive universities and specialized schools had greater strength in the personnel areas than did the members of the other three categories. However, research, doctoral and liberal arts faculties asserted strong voice in one area, the tenure process, which in many ways is the core decision area for members of the academic craft.

The Agents. All of the academic bargaining agents claim to be the most effective for every faculty they represent. While our data did not reveal any truly marked differences among them, we did uncover some variation.

In the four-year sector, agreements negotiated by the AFT and mergers contained the strongest faculty rights guarantees. Contracts of the NEA, AAUP and independents had weaker provisions. In the two-year sector, stronger rights clauses were found in the agreements of the AAUP and Mergers, followed in order by the AFT, independents and the NEA. The fact that an agent was concentrated in a particular sector did not assure strong assertion of faculty rights, e.g., 80 percent of NEA agreements are in the two-year schools and 88 percent of the AAUP in the four-year.

NEA agreements had the strongest assertion of management rights. Next, in order, were the AFT, independents, AAUP, and mergers. With regard to this issue, the agents had the same rankings in both the two- and the four-year sectors. Perhaps overall policies more clearly govern the type of management rights clause an agent will consider acceptable, while the rights gains an agent can achieve for the faculty it represents are dependent on other factors.

Interesting questions are raised by the fact that Mergers had relatively high faculty rights scores and relatively weak assertion of management rights. Does this indicate that when faculty unions are able to overcome organizational rivalries, they can negotiate more effectively?

While some agents were more clearly associated with strong rights language than were others, their performance varied a great deal from one set of institutions to another and from one issue to another. It appeared that institutional and demographic variables served to inhibit or promote the interests of the various agents on particular campuses. In many cases, then, the identity of the bargaining agent mattered less than the region, affiliation, size or type of the institution in question as well as its status as either a four-year or a two-year school.

Two-Year vs. Four-Year Schools. The contrast between two-year and four-year faculty rights assertion was quite marked. For every area the two-year means were lower. However, it must be remembered that prebargaining faculty rights in two-year schools usually were much weaker than those in four-year institutions. In at least some parts of the four-year sector, the administration and faculty primarily were engaged in sorting out their respective rights and then placing them in the contract.

On the other hand, most two-year faculty associations, using the four-year as a model, were just beginning to chip away at the bundle of rights held by the administration. Thus, two quite different kinds of rights battles were taking place, and in reality, we are looking at two quite different kinds of achievements concerning contractually-specified voice in administrative and personnel decisions.

Conclusions

In assessing the impact of academic bargaining on management rights, our research has shown that the results are far from uniform. We discovered variation associated with a number of factors. Thus, we found that two quite different but related rights contests are taking place, one centered in the four-year and the other in the two-year schools. Not surprisingly, the extent of faculty and administration rights assertion was related strongly to institutional size and region. However, the failure of the public schools to outperform the private was somewhat unexpected, as were the results concerning the agents' effectiveness as measured by strength of faculty rights assertion. Degree of effectiveness often seemed to depend more on the specific situation than on the identity of the agent. As many have predicted, institutional type proved to be associated with differences in assertion of rights in the four-year sector.

By and large administrators appeared to be joining faculty members in attempting to place their traditional prerogatives in the agreement. In these first stages of bargaining, rights assertion for both sides is generally moderate, but some administrations have negotiated very strong management rights statements, and some faculty associations have obtained clauses providing for very strong voice. Faculties did have difficulty in moving beyond assertion of rights in the customary personnel concerns of their craft. Gains in the administrative areas were truly modest, although retrenchment appeared to be a growing issue.

Clearly, the provisions faculties have been placing in the contract reflect a professional-craft orientation to collective bargaining. This generalization applies even to the less craft-like two-year sector whose bargaining demands, as noted, reveal that it holds the four year schools as a model. More than any other indicator, the great emphasis on moving strong tenure language into the agreement affirms the craft approach. Tenure is the keystone of this craft's existence. Via the tenuring process traditional craft controls can be exercised. Without voice in this process, the professor is merely an employee with direct relations to the administration. It is no accident that tenure received the highest mean score for assertion for rights in the four-year sector.

What are the implications of the craft model for the rights issues of the future? We do not foresee any possibility that faculty associations will move away from this model and toward the industrial type. Crafts are known to be flexible within their own groups but rigid in their external relations. They can be adaptable, but this is not one of their prime characteristics. If craft employment conditions and rights are provided, the craft will concern itself with administering these. But if they are tampered with, if, say, tenure systems are threatened, unyielding reactions are apt to occur. The group will rise to defend its jurisdiction and may well engage in a great deal of nonproductive activity. Crafts have the ability to participate effectively in the managerial process, but the relationship of a craft to its management can become destructive if both parties begin to focus on the defense of their respective rights to the neglect of the problems that both should be trying to solve.

What is the likely future of the faculty-administration or craft-bureaucrat relationship? In the next decade higher education will become increasingly product oriented. New clientele will be sought and new programs initiated in a competitive search for markets. Administrators will be pushing hard on matters the professoriate considers to be within its rights and jurisdiction. Given the predominantly craft style of faculty unionism and the nature of the prospective issues of the 1980's, controversy over rights is almost certain to grow.

FOOTNOTES

[1] The recent Yeshiva decision of the Supreme Court affirmed the existence of this dual power structure, declaring the Yeshiva professors' role in it so significant that they could not organize as an employees' association for the purpose of collective bargaining.

[2] The authors wish to thank the National Center for the Study of Collective Bargaining in Higher Education at Baruch College, City University of New York, for the use of its files which contain the most complete collection of faculty contracts in the country. In defining the units for analysis, multi-campus units were handled as a single case. However, if the multi-campus unit contained both four-year and two-year campuses, it was treated as a single member of each category.

[3] The NEA had 85 agreements, the AFT, 48, The AAUP, 26, independents, 24, and mergers, 22.

[4] These institutional types were drawn from the well-known Carnegie Commission system of classification.

[5] A regression analysis and zero order correlation coefficients were used to analyze the data.

9. FACULTY RELATIONS IN NON-UNIONIZED INSTITUTIONS

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As I reviewed the topics listed in our program for discussion by various speakers and group sessions, I was struck with admiration for the imaginativeness of the program's author in portraying as ostensibly divisible and identifiable subjects that to me are simply contiguous, interrelated and indivisible facets of a single issue. One may refer separately to the economic or legal setting of faculty-administration relations in the '80s or to the "scramble for power" or to faculty relations in unionized as contrasted with non-unionized institutions. And surely one must recognize the increasing demands of society upon higher education, the demographic realities and the observable, creeping conservative financial attitudes of the public. But it seems that the vital concern is centralized in one inquiry: given that the responsibility of a college or university is to provide education at a level consistent with its goals and resources, and aware that the direct provision of this product is through scholars and teachers, how best to maintain that service without interruption and with a minimum of internal strain.

If this formulation of the issue is substantially accurate, except for the ever present contest over allocation of financial resources for faculty salaries and benefits, the problems are then perceived only minimally as having adversarial characteristics. Instead, they are susceptible in large measure to a bipartisan approach originating from common interests.

Allocation of Financial Resources

I must set aside the economic issues for obvious reasons. It would be naive to assert that a community of interest between faculty and administration will prevail here. There are not many institutions like Yeshiva University where faculty are significantly involved – or involved at all – in budgetary, tuition and admission decisions. This is not to suggest that if they were involved the result would be substantially different or that there would be any degree of unanimity among faculty, either.

For example, the short-term self-interest of a faculty member threatened with dismissal because of impending retrenchment would presumably lead him to favor the lowering of admission standards if this might entice more students and preserve his job. A secure, tenured member of the faculty might be on the other side of the issue. But a long-tenured faculty member with three years left until retirement might oppose rebuilding of the athletic field house, a measure designed to improve the attractiveness of the institution, in favor of packaging the projected capital outlay into higher salaries and consequent improved retirement benefits. Those faculty somewhere in between these two might very well split on these questions, some being grudgingly willing to swallow the immediate offense to their professional pride and pocketbooks in recognition of the long-term benefits of enticing more students during lean years, and others being unwilling to do so.

But decisions as to allocation of financial resources, except in a few institutions, are normally reserved to the administration and the trustees and, in public institutions, to the legislature as well. These have the obligation of addressing the long-term as well as the immediate goals and needs of the institution. I doubt that this will change dramatically in the next decade. And, further, for economic issues, which are surely legitimate subjects of collective bargaining, to be susceptible of arm's length negotiation, the recently-decided *Yeshiva University* case either expressly declares or strongly suggests that this could occur only in a context where faculty involvement in governance is minimal. This condition simply does not exist in most institutions of higher education in this country.

Besides, too many presently unpredictable variables will govern in the economic area: market conditions; inflation; the availability of federal grants and loan programs to make higher education available to those who might not otherwise be counted in the pool of potential students; the degree of imagination exercised by institutions in modifying their programs or innovating new ones; and the extent to which there is a shift either to or from public institutions. All that anyone can suggest, it seems to me, is that the degree to which an administration frequently and candidly communicates to faculty the impact of financial constraints, and the reasons therefor, will dictate the difficulty of resolving these problems.

To eliminate any surprises in this presentation, I will advise you now that the thrust of my following remarks will be the advocacy of an effective faculty grievance procedure as the chief ingredient of harmonious faculty/administration relations. And, parenthetically, I will note that although the topic in the program uses the phrase "employee relations", believing that what is of special interest to this group is "faculty relations", I will confine my remarks to that area.

The Faculty-Administration Relationship

Before one can intelligently explore in a concrete fashion the elements of sound faculty relations in a non-unionized institution, one must have a firm grasp of certain peculiarities of the relationship. An appreciation of the desirability, from both an administration's and the faculty's viewpoints, of the innovation I will advocate must proceed from a clear understanding of the nature of the problems to be resolved. Further, the prospective impact of *Yeshiva* must be assessed, however briefly. Indeed, reference to *Yeshiva* is not only essential, but having been intimately and actively involved in the case since its inception, I find that irresistible.

Although, at first blush, the *Yeshiva* decision would seem to have a depressing effect upon the topic of faculty relations, I believe that upon closer examination one will find that this may not be an accurate analysis. Consideration of faculty relations was or should have been on the highest level of priority before *Yeshiva* and ought to continue in that status now.

Those institutions whose faculty do not significantly participate in governance (without attempting at this moment to define precisely what that means) were potentially subject to unionization and will continue to remain so. Those unorganized faculty who have remained so either by reason of their own perceptions of the incompatibility of collegiality and collective bargaining or because, as *Yeshiva* wound its way through the courts, believed that the characteristics of their status would disqualify them from organization, will remain unorganized. Those administrations which perceive in *Yeshiva* an opportunity to seize greater control of what had become faculty prerogatives will undoubtedly conclude that movement in that direction will inevitably remove the bar of exemption; these administrations would be well-advised to refrain from expanding administrative powers at the expense of faculty involvement. Beyond that, those administrations which view *Yeshiva* as relieving them from the obligation of dealing constructively with faculty complaints are misguided, in my estimation, even in a non-legal sense. Note that I said "dealing constructively"; that is synonymous neither with capitulation nor with capricious control.

Conversely, the voluntary relinquishment by faculty of governance powers, usually acquired after decades of pressure, persuasion and political fervor and occasionally aided by administrative self-enlightenment and often by necessity, is generally perceived as an unnatural act. Thus, the prospect of retreat by faculty from this hard-won high ground to gain the right to battle in the collective bargaining trenches is unlikely, except in times of dire threat.

There is no question that *Yeshiva* will blunt the aspirations of many faculty to organize where their participation in governance may suggest disqualification. There is further little question that some institutions with faculty unions already in place will experience a departure of that form of representation. However, in my view, by and large, what existed in faculty relations before will exist in the future, the principal difference being that some guidelines of demarcation regarding collective bargaining have now been defined.

Faculty Prerogatives

There are a variety of indigenous and virtually intractable features of a – for want of a better term – "mature institution" or, if you will, an institution where "collegiality" exists, which largely define the parameters of faculty relations. I recall being alternately bemused and outraged as I observed and not infrequently battled the National Labor Relations Board in its blind groping toward resolution of the faculty union issue. I perhaps agreed with the Board only when it conceded in the *Adelphi University* case in 1972 that faculty "are not quite either fish or fowl" and that "a genuine system of collegiality would tend to confound us." In this conundrum lies the key to understanding the true nature of faculty relations in mature institutions.

Although the degree varies from institution to institution, faculty, mostly but not exclusively senior faculty, exercise extensive prerogatives affecting other faculty in fundamental aspects of their relationship to the institution. These prerogatives range from initiative or recommendatory action to primacy in the following areas: hiring and conditions thereof, including salary; reappointment and non-reappointment of non-tenured faculty; promotion; tenure; salary increments; course assignments; program revision and determination of the "mission" of the department (both of which may affect the continued employment of other members of the department); and others. True, the Dean, the Provost, the President and the Board of Trustees retain, as the NLRB terms it, "ultimate legal authority" in many of these areas, unless they have been formally delegated in a Faculty Handbook or by a favorable administrative response to a Faculty Senate resolution. But in most institutions administrative reversal of well-documented and generally-supported faculty recommendations for action and, indeed, the assertion of administrative power in a confrontational posture are most infrequent.

Of course, the chief explanation for this phenomenon in academe may be found in necessity and not in beneficence. A university president or provost whose scholarly background is computer science is hardly the proper evaluator of a tenure candidate in history or psychology. Whether certain courses in the field of astrophysics have become obsolete must be left to the experts in that field. As the Supreme Court discerned, by and large faculty determine academic policy, and faculty self-interest in the academic areas generally coincides with the goals of the institution. And whether they do or not, the administration is relying upon the faculty to formulate and implement that policy.

Grievance Machinery

This is not to suggest that there are not occasions upon which faculty self-interest, faculty politics or sheer faculty irresponsibility produces an intolerable result. Then, obviously, the administration must apply the checks and balances. It would be derelict in its own responsibility if it did not. What I am suggesting is that in mature, prestigious and/or responsible institutions those occasions rank in the minority. That they may multiply somewhat in the future under the twin pressures of demographic and financial attitudinal trends is probable, although not certain if, as I said before, sensitive attention is paid to the art of communication, to the necessity of advance planning and to procedures for resolving grievances.

The genesis of the majority of faculty grievances in collegial institutions is faculty action. This truism, as I shall shortly illustrate, often comes as a shock to faculty clamoring for relief from the yoke of administrative power. It even comes as a surprise to many administrators who have not thought much about it.

As a result of nearly thirty years in the field of labor law, practiced in the industrial and commercial sphere, I have found that one of the key elements in sound and harmonious labor relations is a formal and respected mechanism for the resolution of disputes. Such a mechanism is commonly referred to as a grievance and arbitration procedure. My last decade of work in academe with the esoteric aspects of "faculty labor relations" (almost, but not quite, a contradiction in terms) has only reinforced that view. The conclusion persists whether the institution is unionized or not and whether the level of collegiality is at the summit or the base of the governance spectrum. And, of course, the preservation of sound and harmonious labor relations, in academe or otherwise, is the most effective antidote to unionism.

Northeastern University's Program

As counsel to Northeastern University, I have had an exquisite opportunity to observe and participate in what I believe is or was a unique and still eminently successful experiment in higher education. In 1973, in an act of enormous enlightenment, then President Asa Knowles, supported by the Board of Trustees, introduced a faculty grievance procedure, ending in binding arbitration. Northeastern then and now is non-unionized. Since 1975, under the administration of President Kenneth G. Ryder, the procedures have been revised, streamlined and strengthened. At the present time recommendations for further, massive alterations in the light of experience are under active and, hopefully, final discussion by a joint committee of the administration, Faculty Senate and this speaker as counsel to the University, culminating a process of nearly two years' discussion.

I believe you should know that a faculty union organizational drive at Northeastern in 1975 failed to convince a majority. Since 1975 there has been little, if any, sentiment for union organization discernible on the campus. I should also tell you that the issues which *Yeshiva* later successfully raised were founded upon Northeastern's presentation in its own case, which never made it to the federal courts because the union lost the election. It is my judgment that the faculty at Northeastern, after *Yeshiva,* would not be recognized as employees entitled to unionize. However, and I must emphasize this, the exclusion of Northeastern's faculty from collective bargaining rights will in no way influence this institution to abandon its experiment.

There is no time to elaborate upon the details of our grievance procedure. Suffice it to say that there is a step procedure for the processing of complaints over asserted unfair, inequitable or improper action concerning a variety of actions affecting a faculty member's rights, privileges and immunities. Included in the protected category is academic freedom and tenure. The review may extend over the entire range of a faculty member's status and relationships with all the constituencies in the institution which may have an adverse impact. There is provision for the expeditious correction of procedural irregularities by the intervention of the Provost's Office at an early stage. This consists mainly of requesting or urging reconsideration under a proper procedure or, if faculty action was not involved, instituting administrative resolution.

The grievance, if unresolved on the highest administrative level, may proceed to binding arbitration. The arbitrator is chosen through the procedures offered by the American Arbitration Association. Restrictions on the arbitrator's authority include the admonition that he or she may not substitute his or her own judgment on the academic qualifications of a faculty member for that of the relevant academic professionals involved. For those who may be wondering, several arbitrators have conceded their inability to confer tenure in any case in which the Board of Trustees refused to grant tenure, as distinguished from awarding damages.

The Actual Experience

The most striking revelation of this procedure came early. Although the Faculty Grievance Procedure was hailed by the Faculty Senate as a barrier to autocratic administrative behavior, it quickly became apparent that administrative injustice was a fairly well-kept secret. The first dozen grievances and four out of the first five arbitrations all involved a faculty member's protests against his or her own peers' actions. Although I or one of my partners appeared at each arbitration nominally as counsel for the University, in most cases we were in reality representing the faculty committee whose action was being contested. The Faculty Mediation Committee, required by the grievance procedure to be appointed by the Faculty Senate in each case with the expressed purpose of seeking a resolution of the dispute and with the unexpressed mission to wrest concessions from a presumed recalcitrant administration, instead found itself rebuffed by faculty departmental or college committees. The obstinacy and unwillingness of some of these groups to compromise or reverse themselves usually concluded with an invitation to the Faculty Mediation Committee to "mind your own business." Out of over a hundred grievances which went beyond the first stage and out of fifteen completed arbitrations, over 75 percent involved faculty action or inaction where the asserted peer miscreants were the real defendants and the administration was only a nominal party.

Our procedure is far from perfect; it is not free from problems. Faculty committees are not always cooperative with proposed administrative settlements or even arbitral orders. Arbitrators' decisions are not always consistent. A competent, knowledgeable staff is necessary to administer and manage the process. Valuable time of both faculty and administration is expended. Arbitrations are sometimes expensive. The arbitration occasionally carries beyond the end of the academic year and prudent planning is hampered. The contest over confidentiality of peer review persists. Aggrieved faculty members' attempts to compare qualifications with a departmental colleague or "matchmate" whose salary or rank is higher, thus dragging an innocent bystander into the controversy, continue unabated.

Evaluating the Procedure

With all this, you may justifiably ask, is it worthwhile? In my judgment, the answer is unequivocally Yes.

An aggrieved faculty member, whether his or her protest is directed against peers or the administration, like everyone else, needs and deserves a forum and procedure to pursue a remedy. Simple justice is absent without a reliable, impartial procedure; it is intuitively offensive to our notions of fair play. It is particularly vital in academe because of the continuation of the relationship for some many months or even years, contrary to the custom in industry where no AAUP principles prevail. Without it, frustration quickly degenerates into bitterness. That embittered faculty member may rapidly become less useful to himself or herself as well as to the department. He or she may refuse to cooperate in departmental and university affairs, neglect other academic responsibilities and be a thorn in the side of colleagues until time or circumstance heals the wound or enforces a separation. If the claimed offense is non-reappointment, much of the value of that teacher for the rest of the academic year may be lost because, psychologically, the separation has already taken place.

On the other hand, hope springs eternal – even, or especially, in the heart of an academician. Not until all attempts at compromise have been exhausted, not until an arbitrator finally says No does that faculty member normally accept the decision as final. The pendency of the appeal itself tends to introduce moderation into the faculty member's attitude. The possibility of a reversal guards against antisocial and uncooperative conduct toward peers with whom that faculty member may work for a long time. The existence fo the procedure itself defuses that frustration which is the principal catalyst of the self-destructive behavior.

The requirements are less in private than in public institutions, although the Northeastern procedure would satisfy even the constitutional requirements. By guaranteeing a form of due process, non-intervention by the courts is generally assured. If a faculty member has no other remedy, he or she may resort to the traditional form of litigation. As expensive as arbitration is, court proceedings usually turn out to be even more expensive. Besides, arbitration preserves a degree of privacy which public litigation does not.

In three cases, grievants in the Northeastern University procedure sought recourse in the courts, once before, once during, and once after arbitration. In all three cases the court referred the matter back to arbitration. With an apparently fair and workable procedure in place, having the elements of due process, the court concluded that this should be the exclusive remedy.

The Effectiveness of Arbitration

In our arbitrations the arbitrators have recognized that confidentiality of peer evaluations is an historical imperative at Northeastern. While some courts, after much agonizing in cases arising in other institutions, have subscribed to the same principle, others have not. Given the tradition of full disclosure and discovery prevalent in federal and in most state courts, this reluctance to prohibit exposure of deliberations by peers is understandable. If you want a frightening example of the disastrous consequences of subjecting members of evaluation committees to depositions by lawyers, all you need do is peruse the sex discrimination case of *Lamphere v. Brown University* in the federal courts. It's enough to make your blood run cold.

Another consideration is that with arbitration both parties have input into the selection of the decisionmaker and have reasonable assurance that he or she will have extensive experience with academe. In litigation you are playing Russian roulette. Even a judge who expresses a willingness to learn the exotic and unusual nuances of the academic evaluative process has little time to cultivate this luxury.

The procedure also tends to insure accountability and encourage more responsible action. No one enjoys the prospect of an arbitrator's castigation in print. While the general public or lawyers not particularly interested in the subject matter won't read the decision, the participants in the events are aware that their colleagues will. There is, thus, a built-in deterrent aspect to arbitrary and unfair treatment.

Of course, a grievance procedure which omits arbitral consideration and culminates in final action by the president or the trustees will fail to achieve the salutary objectives discussed above. Credibility is critical. Whatever the president's inclinations toward fairness, in many cases there will be too many constraints on his freedom of action. The faculty perception of such a procedure may be that of a charade.

Finally, I wonder why presidents and trustees often resist so strenuously the suggestion of an impartial arbitrator to finally decide essentially faculty versus faculty disputes. I have frequently pointed to an extraordinary benefit of such a remedy: it may permit a harried and troubled chief executive, whose decision in the case would inevitably offend one group or another and who in this instance is largely indifferent to the outcome, to turn his "the buck stops here" sign toward the wall.

In summary, then, I strongly advocate the voluntary introduction of a grievance and arbitration system for faculty into institutions of higher education, especially those which are *not* unionized. Properly crafted and conscientiously administered, it will not injure vital institutional interests and objectives; rather, it will tend to advance them. I consider the fair, expeditious and peaceful resolution of faculty grievances a continuing and essential responsibility of academic institutions and a critical element of harmony on the campus. The expected trauma in academe of the 1980s only serves to underscore this recommendation.

10. UNION ACCOUNTABILITY: THE DUTY OF FAIR REPRESENTATION

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I come to this topic as an advocate and union practitioner. I have familiarized myself with the many facets and slippery ambiguities of the Duty of Fair Representation (DFR) out of necessity arising from daily contract administration in the past 14 years. I strive to maintain some equilibrium in the complex situations of contract administration as I am called upon to balance legitimate union objectives against individual needs. From the scholarly, legal, and theoretical perspectives, DFR has been subjected to close and repeated examination. Among the leading discussions on the subject, are those by Archibald Cox, Benjamin Aaron, Clyde Summers, Robert Rabin, Julia Clark, and Tobias & Fleming. Unfortunately, many are strident champions of spurious individualism in Labor-Management Relations, and, I am sorry to say, most are academicians with little or no time logged at the bargaining table or in contract administration.

I find also, that with a few exceptions, very little attention is devoted to the problems and perspectives of the people in the trenches – that is, the business agents, the Uniserve agents, grievance chairmen, or coordinators. Yet, with the proliferation of lawsuits by members against their unions and aggressive judicial activism in the area of DFR (especially in some circuits), these union officials have increasingly come under the gun. This has resulted in new tensions in even routine grievance processing. Even before many institutions of higher education have had the opportunity to negotiate and flesh out a grievance-arbitration machinery, the voluntary settlement process has come under judicial scrutiny and, at times, heavy-handed intrusion.

Given the labyrinthine nature of the topic, the scope of my discussion should be delineated. It will be confined to the DFR in contract administration. Fair representation as it relates to bargaining, union discipline, dual unionism, or interest arbitration will not be examined. The basic presupposition in dealing with the topic is the existence of a union and a collective bargaining agreement which culminates in binding arbitration of some sort.[1]*

My objective is modest – to outline the sources of a union's DFR, to try to come to grips with the standards established by the courts and agencies, and to attempt to make some practical suggestions for the non-lawyer practitioner.

I. The Sources of a Union's DFR

The source of a union's DFR evolves from a combination of three elements – the union's standing as sole bargaining agent, the union's fiduciary role and judicial prescription. It arises out of the need to reconcile the collective interests as represented by a union and the interests of the individual who by definition must have his rights submerged.

The concept as developed by the judiciary evolved from attention being focused first on invidious racial discrimination[2] (both in negotiations and contract implementation), shifted to discrimination which was non-racially motivated (non-members, political enemies, etc.), to conduct which was "arbitrary, discriminatory, or in bad faith,"[3] to an examination of the quality of representation.

Generally, the basic premise is that a recognized, duly elected union has been empowered to act as the exclusive bargaining agent of *all* employees. It is settled law that this exclusivity is not confined to the bargaining table but extends to daily contract administration with management. Since the advent of the NLRA, employers have had the affirmative obligation to bargain only with the majority union. Further, grievance discussion and questions of contract interpretation are logical correlatives of this obligation. Increased recognition of collective, centralized rights of unions developed through authorization of compulsory union-security provisions and the agency shop.[4] This strengthening of union power has also been closely paralleled in the public sector. In this view, the agreement is between employer and union, and the daily process of particularizing the wide ranging topics covered by agreements belongs to them. "The individual holds no direct right under the contract but is the beneficiary of a fiduciary obligation."[5]

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*Footnotes for this paper will be found on pp. 82-83.

The union is afforded wide latitude in negotiations and the processing and settlement of disputes since it has a broad overview of past, current, and potential problems and is in the best position to assure internal consistency. It is also best able to adjust the demands of competing groups, thus avoiding fragmentation of goals. The purpose of exclusivity is to avoid diffusion of strength, to insure equal application of benefits that have been gained, and to prevent rivalries which are not conducive to productivity. The courts have not been particularly moved by fear for the interest of individuals if the concept of union latitude is tied with good faith representation.[6]

With respect to this point, the Supreme Court in *Ford Motor Co. v. Huffman* (1953) recognized that "the complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[7] In representing the constituency, the union must be free of conduct unrelated to its legitimate objectives.

The theory of fair representation, then, was fashioned by the courts to make the bargaining agent's responsibility commensurate to its authority. The authority, therefore, is not absolute. The union must make an honest effort to act in good faith, without discrimination and arbitrariness. The decisions it makes must be rational, even if the choice was not the only one it could have made. Unions are not free to do as they please. Although the courts have left the authority to protect the integrity of the contract to the union that negotiated it, the courts have drawn some bounds. The union can make judgments, including moving a grievance into arbitration, providing that the judgment is free of discrimination, hostility, prejudice, personal animus, malice, or arbitrariness. It cannot ignore rights and benefits once these have been established by the contract.

The rights and obligations of unions in the public sector and in education have followed the pattern set in the industrial, private sector very closely; the guiding principles of DFR being substantially the same. Some states have incorporated DFR through legislation, some have applied federal court rulings in the state courts, some have construed breach of DFR to constitute unfair labor charges enforceable by appropriate state agency. Further, the Supreme Court, in *Abood v. Detroit Board of Education* (1977), which upheld the agency shop for public employees, reiterated that the union, in carrying out its duties as exclusive bargaining agent, is obligated to fairly and equitably represent all employees in the bargaining unit, both union and non-union.[8]

Thus, the duty of fair representation is recognized through the function of a union. But, once recognized, the duty is not set in concrete but is subject to continuing case by case interpretation.

2. Criteria and Standards

The leading case which attempted in some detail to clarify what constitutes the DFR is *Vaca v. Sipes* (1967). Earlier recognition of the duty had not addressed the more difficult problem of what that duty entails.

In *Vaca*, the Supreme Court stated that in instances where the union had sole contractual powers to invoke arbitration and it *wrongfully* refuses to do so, the employee may bring action against the employer providing he can prove the union breached its duty of fair representation.

Owens, a discharged employee, sued his union for breach of DFR in that it had refused in bad faith to take the grievance to arbitration as it could under the contract. If proven, the employee could seek redress against the employer.[9] The union had concluded after initial processing of the grievance and extensive investigation (and otherwise trying to solve the employee's problem) that arbitration would be fruitless and the grievance was dismissed.

The court found for the union in that there was no discovery of wrongful conduct. "Breach of union's statutory duty of fair representation occurs only when union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[10] The court accepted the proposition that "the union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion", but it did not also accept "that the individual employee has an absolute right to have his grievance taken to arbitration"[11] and warned that the dampening effect on the grievance process would be substantial if the individual were granted such a right. It held that union discretion over the grievance machinery and arbitration has some distinct advantages – the ability to settle short of arbitration and screen out frivolous grievances prior to more costly and time-consuming steps; the assurance that similar complaints will be treated consistently; and the advancement of the interest of the union as the co-author of the bargaining agreement. "If the individual could compel arbitration of his grievance regardless of merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."[12]

While *Vaca* does not require the union to take every case to arbitration, it does permit the courts to audit in retrospect how the union discharged its obligations. However, the fact that the grievance is later found to be meritorious by a judge or jury, does not in and of itself constitute breach of DFR.

Some recurring words and phrases in *Vaca* are worthy of attention to the practitioner. It is clear from reading the majority opinion, that the court was impressed with the union's "diligent" supervision of the grievance. The union acted in good faith and on objective considerations (including sending the employee to a doctor of his own choice at union expense to determine if the employer's medical evaluation was warranted). The union did not "ignore" Owens' complaint. The complaint was carefully investigated as the union attempted to gather "sufficient evidence" on which to make its decision. The grievance was not treated in a "perfunctory" manner – the union's attempts to resolve the problem by attempting to have the employer place Owens into a less vigorous working situation and to have him rehabilitated show interest and care for his welfare. Clearly, the union had made its decision on the "merits" of the case it was confronted with.

Three major lines of thought converge in *Vaca*. One, there is a clear and strong reaffirmation of the rights of the sole bargaining agent to settle grievances short of arbitration with an admonition to unions that they have responsibilities equal in scope to their authority. This is the same line of reasoning espoused in

Humphrey v. Moore (1964)[13] and *Ford Motor v. Huffman* (1953). Second, standards which previously had only been adumbrated are brought into focus and are to serve as deterrents against arbitrary union conduct toward "individuals stripped of the traditional forms of redress."[14] Third, *Vaca* judicially recognized damages for injury inflicted by breach of DFR. (In a subsequent case, *Amalgamated Association v. Lockridge* (1971), the court further stated that a clear and "strict" distinction must be made between "honest, mistaken conduct" and conduct that is "deliberate and severely hostile and irrational treatment."[15])

The focus shifted in the court's attention from an examination of the union's substantive decision as to the merits of a grievance, to a review of the performance aspects of fair representation in arbitration.

Steele, Huffman, and their progeny had emphasized impermissible motive (bad faith, discrimination, personal hostility, collusion, political motive) and severe, intentional conduct. In *Hines v. Anchor Motor Freight* (76),[16] bad performance is equated to bad faith and sets the stage for the prevailing confusions at the lower court levels.

Hines is troubling to union and management alike in that it expands judicial auditing to arbitration and, indeed, sets aside the finality of some arbitration decisions. In the case, employees brought suit against the employer for wrongful discharge and the union for breach of DFR alleging that the falsity of the charges could have been discovered with "minimum of investigation" by the union. In finding for the plaintiffs, the court removed the bar of finality established under the *Steelworkers Trilogy*[17] stating that "an arbitrator's decision is reviewable and vulnerable if tainted by a breach of duty on the part of a labor union"[18] which contributed to the "erroneous" outcome of the contractual proceedings. Distinct from the issue in *Vaca*, the union here *did* submit the matter to arbitration under the agreement, but the performance was deemed "perfunctory." In the court's opinion, more than "mere error of judgment" occurred. The union's conduct was not "within the range of acceptable performance" and the word "malfeasance," though used only inferentially in the opinion, is added to the vocabulary of DFR.

Consequently, further risks to the union arise as a result of *Hines*, insofar as proper representation of a case in arbitration might well be scrutinized. Some comfort can be derived from the court's assurance that the merit of arbitration awards should not ordinarily be reviewed; although, as pointed out in Justice Rehnquist's dissent, the court's action in this case "obviously . . . stretches *Vaca* far beyond its original meaning and adopts the novel notion that one may vacate an otherwise valid arbitration award because his 'counsel' was ineffective."[19]

What are the practical ramifications of these broadened measures of breach of DFR? While *Vaca* created the temption to press grievance to arbitration, different temptations arise from *Hines*. For the employer, the temptation to exclude certain subjects from arbitration; for the union, the temption to abrogate its responsibility and allow the grievant to present his own case; for employer and union both, the temptation to resort to increasing formality in the arbitration proceedings.[20] Giving in to these temptations will defeat the benefits of arbitration as a preferred method to resolve conflicts promptly, inexpensively, and conclusively in a relatively informal procedure suited to the needs of the parties to the collective bargaining agreement.

I would give *Hines* a slightly different construction than most commentators have. One, *Hines* can be viewed as an elaboration on the standards of "perfunctory" and "arbitrary" by requiring a minimal level of care and an effective adversary performance by the union in arbitration. (Such was surely not exhibited by the union in *Hines* when it was approached with a possible lead in the case; it told the grievants "there was nothing to worry about" and "that there was no need to investigate.") Second, the arbitration committee in *Hines* was composed of union and management people; it did not include an outside, impartial arbitrator. I believe that *Hines* further commends and underscores the advantages of an expert neutral over in-house panels or committees – in particular, since an arbitrator can reasonably protect the rights of the grievant when faced with inept union representation. Third, the union, once having made the substantive judgment on the merits of the grievance to invoke arbitration, should prepare to represent vigorously and diligently, especially in discharge cases where the burden of proof, after all, lies with management. The interest of the union will not suffer from a tightening of requirements.

More disquieting are the myriad of lower court decisions, particularly with respect to the volume of cases and the lack of consistency in approach and, more recently, apparent conflict with NLRB guidelines.

Some of the most quoted decisions antedate *Hines*. In 1970, the First Circuit in Boston held in *Figueroa v. Trabajadores Packinghouse*[21] that procedural error, failure to give adequate attention to a grievance believing it to be under NLRB jurisdiction, constituted arbitrary and perfunctory conduct. In *Griffin v. UAW*,[22] the Fourth Circuit in Richmond held that the union, having filed a grievance with the official with whom the discharged grievant engaged in a fistfight, was "perfunctory" and "unreasonable" in handling the grievance. Bad faith was pressed as a necessary element in either case. In *Minnis v. UAW*[23] in 1975, the union's conduct was judged to be sufficiently arbitrary when it was inadequately prepared.

Then in 1975, the Sixth Circuit distinctly rejected a showing of bad faith as a necessary element in breach of union's obligation in *Ruzicka v. GM*.[24] Going counter to its own previous rulings, the court ruled improper motivation did not have to exist in order to find an absence of fair representation. In *Ruzicka*, which involved a discharge for intoxication and abusive language, the union, after two time extensions, had failed to file statements necessary to invoke arbitration and had failed to notify the grievant that the union was not proceeding. Once the deadline had passed, GM refused to arbitrate. The court found the facts of the case to indicate negligence. Failure to act due to negligence was deemed "behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness, a perfunctoriness, the union should be held responsible." The negligent handling of the grievance, in the court's opinion, amounted to arbitrary representation.

Much confusion is raised by *Ruzicka*, witnessed by the fact that the Michigan district courts, bound by the Sixth Circuit, have not followed *Ruzicka* too closely. Is negligence, which is unintentional conduct, separate from arbitrary or perfunctory conduct, which is intentional? Or are the lines between willful and non-willful conduct obliterated in *Ruzicka*?

Perhaps the answer lies in the fact that in *Ruzicka*, the union had "inexplicably" neglected to take the plaintiff's grievance to the next required step. The union had not passed on the merits of the grievance (as in *Vaca* and *Hines*) but had simply forgotten, without advising the grievant or the employer that it had abandoned the grievance. What we have, then, is unintentional conduct, unrelated to the merits of the grievance, where the union allowed the grievance "to expire by negligently failing to take a basic and required step toward resolving it." The union inaction is arbitrary in the limited sense that it is "inexplicable" and without apparent reason. The best reading of *Ruzicka* is that procedural negligence (failure to inform properly; filing timeliness; notices; etc.) can be actionable; but the substantive decisions of the union, as guaranteed in *Vaca* would remain intact (good faith; substantive judgment on the merits of the grievance, though in error, will not be considered a breach). The breach occurs when there is reckless disregard for the rights of the union member, which in this case meant simply to let the matter lapse. In citing the crucial parts of *Vaca*, the Sixth Circuit still acknowledges that the union has wide latitude and discretion in making judgments – even poor judgments. The union may indeed abandon a grievance, but may not forget about it. A union may decline to pursue a member's claims, but may not ignore them.

Ruzicka is echoed in the Ninth Circuit's ruling in *Robesky v. Quantas Airways* (78)[25] which held that unintentional acts or omissions can cause unfair representation if they show "reckless disregard for the employee's rights." The union, by failing to inform its member that it did not intend to pursue her claim to arbitration, had acted so egregiously, so far short of minimum standards of fairness to the employee, that a breach of duty of fair representation occurred. *Ruzicka* and *Robesky*, then, broaden *Vaca* Supreme Court standards from arbitrary or deliberate inaction to inexplicable inaction resulting from negligence.[26]

Other circuits do not agree, however, with *Ruzicka*. The St. Louis court, in *Mavis v. BRAC*[27] in 1978, declared that it would continue to define fair representation narrowly. "Severe and deliberate" hostility on part of the union was still the measure of establishing a claim of breach of DFR. Again in the Eighth Circuit, in *Ethier v. U.S. Postal Service*,[28] the court focused on improper union motivation to be the "crux of the fair representation doctrine." Interestingly, NLRB General Counsel John S. Irving, in a memorandum to field offices in 1979 (and seemingly in response to court activism in this area), is arguing along the narrow lines of the Eighth Circuit. Irving states that in virtually all cases an element of bad faith must be found for the agency to proceed against a union. Negligence alone will not be sufficient: "the mere fact that the union is inept, negligent, unwise, insensitive, or ineffectual, will not, standing alone, establish a breach of the duty."[29]

3. Evaluating the Grievance Machinery

How do we translate these proliferating criteria to the grist of everyday union administration?

Perhaps most importantly, unions must not over-react to the developments we have discussed. We must not dilute the union's role in policing and administering the contract because of worries over potential lawsuits. The union's fiduciary obligation to *all* members demands that. We have to recognize the reality of increased statutory intervention[30] and judicial activism. There can be little doubt that union members, even faculty union members, will become increasingly litigious as the district courts' sense of restraint is not very well developed. With broadened standards, those of us in the field must simply make the necessary adjustments and broaden our vigilance in grievance processing. Barring freakish judicial aberrations as in *Holondak* and *Milstead,*[31] most of the requirements do not strike me as particularly unreasonable. It would seem that in our profession, where we pride ourselves on careful research, investigation, prudence, and reason, the criteria outlined by the courts should not appear threatening to us. Even without court scrutiny, most of us would probably do the right thing guided by a sense of fair play.

Indeed, very few court cases can be found involving faculty unions being charged with breach of DFR. It may be that we are not given to airing our dirty linen in public, it may be that faculty are not yet as politicized as other unionized workers, it may also simply be that, for the most part, faculty unions have done a creditable job in the area of representation.

What does trouble me, is the potential fallout effect of the new emphasis on DFR, insofar as union officials might become less willing to make the hard decisions that are synonymous with leadership and be inclined to simply pass the buck to the arbitrator. Fear on the union's part will de facto give individuals the opportunity to compel arbitration – an opportunity from which they are foreclosed by case law. One can conceive of many situations in which the union must reject an individual grievance for reasons *other than merit*. Arbitration of every issue, including frivolous ones, those in which one takes advantage of honest administrative error, and those where the benefit to the whole membership is clearly negligible or might cause an unwanted precedent, will *undermine* constructive union-administration relationships which in many institutions are tenuous at best.

The grievance machinery has several steps built in specifically to encourage settlement of disputes. A mature union should no more surrender its prerogative to settle disputes for fear of members' retaliation through litigation than for political reasons in bargaining units where factions exist. A union fulfills its fiduciary obligation best by trying to settle conflicts, resolve grievances and their causes.

Even where the individual has unfettered access to the grievance process in the early stages (as is the case in many faculty contracts), he should *not* be able to proceed to the higher steps without the union. Any early resolution by the individual must be policeable by the union through its presence to assure contractual compliance. If the union does take charge of the grievance later, the person chosen by the union to process the grievance must be accepted by the grievant. The contract does not belong to the individual, but to the whole membership. To deprive the union of this right, or, for the union to retreat from this area, would "deprive the employer and the union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."[32] Conscientious handling of grievances can only enhance the union's prestige and standing among its members. Furthermore, the interests of a confident and mature administration in this regard are identical to those of the union.

Coupled with my advocacy of assertive union authority in contract administration, I want to outline some constraints which must be assumed to *reduce* the risks of breaching DFR. Having sought exclusive control, we owe the membership reasonable and uncompromising standards of care in both the substantive and procedural areas of grievance handling.

4. Recommendations

Bearing in mind the above, I would like to offer a few recommendations:

In the *substantive* area:

1. Grievances must be decided *on their merits.* The judgments made should be on wholly relevant considerations based on careful and diligent investigation. A cursory inquiry is tantamount to no inquiry. Legitimate considerations should include: (a) origin of claim – is it clear-cut, contractual? (b) Is it ambiguous? (c) Is it trivial? (d) Would test of the claim serve only a narrow range of interest? (e) What are the interests of the individual as against the interest of the whole? (f) What would be the effects of losing in arbitration?

2. In *grievance settlements,* an attempt must be made to settle similar grievances along the same general lines. Settlements should not renegotiate the contract. Further, the indiscriminate horse-trading of grievances, trading off an individual's meritorious grievance to benefit another, would raise questions of fair representation.

3. *Ambiguous parts of the contract,* which the union and management have clarified by some legitimate process, must be applied consistently to all members.

4. In cases of *conflicting claims,* strict neutrality is not required as long as the union investigated all claims before aligning itself.[33] (Most often these competing interests arise in seniority questions, hiring, and internal bidding on jobs.)

5. *Equal treatment* must be afforded all categories of grievances. This is particularly significant in Title VII type claims. To exclude from the regular grievance machinery solely on the ground that the issue is or might be pursued by the individual through the courts is a potential breach.

6. *Discharge and discipline* cases should be treated with special care. Since an interpretation of "due" or "just cause" is usually involved, the matter will be of vital concern to the entire membership. The union attorney should review such cases.

7. The substantive decisions are best made by an *executive council* or group, rather than one individual. The decision should, moreover, be by public vote to avoid even the semblance of star-chamber proceedings. A careful record of the deliberations should exist (though obviously not for public display, as the union should not telegraph its grievance strategies).

8. All procedures regarding the grievance machinery should be *well promulgated* to the membership. This includes the Contract, Constitution, and By-laws and special bulletins on grievance processing.

9. Throughout the decision making process, the individual should be given full opportunity to be heard and present his case. Once the decision is made, he should be promptly informed of that decision. This should also be true of any negotiated settlement.

10. A joint union-administration committee as final binding arbitrator should be avoided.

Turning to the *procedural* aspects, once the union has made the substantive decision to proceed with a grievance, it must act not only as a diligent advocate of the grievant, but also as a prudent representative of the union. To this end, the following should be kept in mind:

1. Utmost care must be exercised in notifications, timeliness, and waivers.

2. Detailed notes on all contacts with the grievant should be kept. Separate files should be kept on each grievance with carefully dated logging of all conversations. Written follow-up summaries of all meetings and phone calls are advisable.

3. Detailed notes should also be kept on all contracts with management regarding the grievance.

4. Every case should be approached as if it was being prepared for arbitration. That means meticulous research into every possible aspect of the complaint.

5. Unsolicited advice to the grievant (e.g., in discharge situations, advising the individual to retire or take a medical leave) must be avoided.

6. In preparing for arbitration, the process should be carefully explained to the grievant. This should include the process of selecting the arbitrator, techniques used, and general approach to be taken. I find that suspicion and fear of the unknown are reduced by this approach. Also, the grievant should be given full opportunity to air his views, concerns, and suggestions. If the services of an attorney are used, ample time must be alloted for him to discuss the issues with the grievant (preferably at some time other than the morning of the hearing). The grievant must be notified, in writing, of the time, date, and place of the hearing. He should never be excluded from the hearing.

7. All pertinent data and contractual provisions that have a bearing on the case should be reviewed with the grievant.

8. At the hearing, especially in discharge cases and those with latent DFR problems, a transcript or taping of the proceedings might prove invaluable later. The cost should be shared by union and administration.

9. Above all, those of us who are practitioners must be patient, self-controlled, dispassionate, and cautious in our relationship to the "client."

5. Conclusion

While this enumeration is by no means exhaustive, it points rather decisively to the need for extensive training and continued upgrading of the practitioner's skills in grievance processing. It is in the union's self-interest to have continuity and experts on the job. Without meaning to sound elitist, it should be noted that the allowances which NLRB General Counsel Irving makes for union shop stewards as "grievance handlers one minute and machine operators the next" do not apply to our profession. We must be prepared to be held to a stricter standard of performance. Perhaps ironically, it is also in management's best interest to participate in providing quality union representation, given employer vulnerability if the union's breach of DFR is proven. To this end, released time for those in charge of processing grievances, full cooperation in investigation, and working out systems to best protect employee rights under the contract (such as informing an individual in discipline procedure that he has a right to union representation) should become management goals.

Having said all this, I find from experience that no matter how scrupulously one attempts to fulfill the duty of representation, complete satisfaction of all individuals simply cannot be guaranteed. It is an axiom of unionization that the individual occasionally suffers as a result of the pursuance of the group interest.

In the final analysis, the greatest test of union accountability is not a judicial but a political one – through the election process.

FOOTNOTES

[1] Approximately 40% of the universities and colleges are now unionized and an overwhelming majority have an arbitration clause of some kind. Grievance machineries are fairly standardized.

[2] *Steele v. Louisville & Nashville Railroads*, 323 US 192 (1944) first spelled out the duty to fair representation in 1944 under the Railway Labor Act as it relates to a negotiated contract.

[3] *Vaca v. Sipes*, 386 US 171 (1967).

[4] Authorization through Taft-Hartley (1947) and for public employees in *Abood v. Detroit Board of Education* (1977) which upheld the agency shop.

[5] Cox, Archibald, "Rights Under a Labor Agreement," 69 Harvard Law Review 645 (1956), *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the *Trilogy*, 363 U.S. 564 (1960) and *Humphrey v. Moore*, 375 U.S. 335 (1964) embrace the Cox theories of union control.

[6] *Vaca v. Sipes*, 386 U.S. 171 (1967).

[7] *Ford Motor Co. v. Huffman*, 345 U.S. 338 (1953).

[8] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[9] Owens had been discharged after a sick leave on medical grounds and was refused reinstatment. His claim was that the employer had violated the collective bargaining agreement and that the union had prevented him from exhausting contractual remedies by failing to invoke arbitration.

[10] *Vaca*, at 188.

[11] *Vaca*, at 192.

[12] *Vaca*, at 192.

[13] *Humphrey v. Moore*, 375 U.S. 342 (1964).

[14] *Vaca*, at 192.

[15] *Amalgamated Assoc. of Street, Electrical, Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971). The case involved discharge based on enforcement of union-security clause. Plaintiff charged union with wrongful suspension from membership which resulted in discharge.

[16] *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

[17] *Steelworkers Trilogy*, 363 U.S. 564 (1960).

[18] *Hines*, at 554.

[19] *Hines*, at 575.

[20] A very special problem regarding expedited arbitration (lauded heretofore by participants and arbitrators alike) is raised when dealing with discharge, discipline, or Title VII claims. Unions may face litigation by disgruntled union members who think they are being discriminated against if their cases are not given the same "conventional" procedure as others. The very features which commend expedited arbitration, are on collision course with increased judicial scrutiny of records of proceedings.

[21] *Figueroa v. Trabajadores Packinghouse*, 425 F.2d 281 (CA 1) (1970).

[22] *Griffin v. UAW*, 81 LRRM 2485 (CA 4) (1972).

[23] *Minnis v. UAW*, 531 F.2d 850 (CA 8) (1972).

[24] *Ruzicka v. GM*, 523 F.2d 306 (CA 6) (1975).

[25] *Robesky v. Quantas Airways*, 573 F.2d 1082 (CA 9) (1978).

[26] Far more invidious is the Sixth Circuit's encroachment into strategy and techniques used in arbitration in *Milstead v. Teamsters Local 957*, 90 LRRM 2150 (1978) which examined *quality* of performance somewhat like the until then isolated *Holodnak v. Avco Co.*, 88 LRRM 2950 (CA 2) (1975), had. Duty of fair representation can be breached by "inept handling of a grievance because it (the union) is ignorant of those contract provisions having a direct bearing on the case."

[27] *Mavis v. BRAC*, 99 LRRM 3087 (CA 8) (1978).

[28] *Ethier v. U.S. Postal Service*, 100 LRRM 2390 (CA 8) (1978).

[29] Irving is quoted in the *News*, July 18, 1979, No. 1235, *The Bureau of National Affairs, Inc.*

[30] For example, in the Equal Pay Acts, VII, Title III of Consumer Credit Protection Act, Employee Retirement and Income Security Act.

[31] Both *Holondak* and *Milstead* examined quality of performance in arbitration, including tactics by the attorney, line of questioning, and strategy used.

[32] *Republic Steele v. Maddox*, 379 U.S. 655 (1965).

[33] *Belanger v. Matteson*, 96 Supreme Court 1466 (R.I. 1976).

11. THE CALIFORNIA EXPERIENCE: PROTOTYPE OF THE EIGHTIES?

Thomas Mannix

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The State of California, against the advice of its committee of labor relations experts who studied the problem of public sector labor legislation in the early 1970's, adopted a piece-meal approach for public employees. The Higher Education Employer-Employee Relations Act (HEERA) extended labor relations coverage to employees of the University of California, the California State University and College System and the Hastings College of Law.

HEERA was the fourth public employment statute in a series which began in the mid-1970's. Public school and community college employees received coverage in 1976 when the Educational Employment Relations Act, sometimes called EERA or the Rodda Act, became effective. The Meyers-Milias-Brown Act covered local public employees by establishing enabling legislation for municipal and other civil sub-divisions. State employees came under the State Employer-Employee Relations Act (SEERA) which became effective on July 1, 1978. HEERA went into effect a year later, July 1, 1979.

Ironically, SEERA was declared unconstitutional by a two-to-one decision of a California State Court in the spring of 1980. The California Supreme Court is expected to hear the case in November 1980. The lower court ruled that the Legislature, in passing the SEERA statute, impermissibly delegated powers away from the State Personnel Board regarding wage setting for employees of the State of California. The State Personnel Board does not have any wage setting responsibilities involving the University of California, so a similar constitutional challenge to HEERA will not be forthcoming, at least not with regard to how wages are determined.

Several interesting and unusual features can be found in the HEERA legislation. Before exploring or commenting on those features of the legislation, I cannot avoid making a passing observation. HEERA uses the words collective bargaining only once in the entire statute (Sec. 3560-b). The statute also avoids the use of the term contract. Under HEERA, public employers will meet and confer with public employee organizations. If, perchance, these meetings result in any agreements, these agreements will be reduced to writing in documents which the statute identifies as memoranda of understanding. Only time will tell us whether or not there is any substantive difference between collective bargaining and contracts and meeting and conferring and memoranda of understanding. Meeting and conferring and memoranda of understanding certainly sound more genteel than collective bargaining and contracts, but I may be fooling only myself with semantics. Those of you who remember the verbal gymnastics we went through in public school K-12 bargaining in the early 1960s will recall the professional negotiations versus collective bargaining debates and the professional associations versus union flyers. If you do recall such times, you may share my *déja vu.*

Governance and Peer Review

HEERA incorporates several statements that involve governance and other closely related matters In Article I General Provisions the statute says:

> The Legislature recognizes that joint decisionmaking and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of such institutions, and declares that it is the purpose of this act to both preserve and encourage that process. Nothing contained in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices, including the Academic Senate of the University of California and the divisions thereof, the Academic Senate of the California State University and Colleges and other faculty councils, with respect to policies on academic and professional matters affecting the California State University

> and Colleges, the University of California, or Hastings College of Law. The principle of *peer review* of *appointment, retention,* and *tenure* for academic employees shall be preserved (Sec. 3561-b; emphasis added)

Even with this strong commitment within the law, many people have serious reservations about the ability of the governance structure to withstand the pressures of collective bargaining. It is possible to argue that almost any matter impacts peer review, appointment, retention and tenure. Academic Senates within the California higher education systems could take a very broad view of what that statutory language means. Faculty unions could take an equally broad view of what is negotiable within the scope of representation language. If these points of view develop, then higher education management may become trapped between the conflicting desires of the Senates and the unions. Such a position is not only uncomfortable, it can lead to changes that will affect the entire governance structure.

Academic Freedom

HEERA also recognizes academic freedom when it states:

> It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas, among the faculty, students and staff of the University of California, Hastings College of Law, and the California State University and Colleges. All parties subject to this chapter shall respect and endeavor to preserve academic freedom in the University of California, Hastings College of Law, and the California State University and Colleges (Sec. 3561-c).

Presumably, the Academic Senate or other similar academic bodies, whether on a systemwide basis or limited to a single campus or division, will exercise governance and academic freedom responsibilities under HEERA. Such bodies are excluded from the definition of an employee organization (Sec. 3562-g) and, therefore, are ineligible to file a Petition for Certification or a Request for Recognition. Traditional governance mechanism structures may not be used to represent faculty under the California statute.

Scope of Representation

HEERA contains separate, but basically similar if not equal, scope of representation language for the University of California (Sec. 3561-q) and for the California State University and Colleges (Sec. 3561-r). There is no statutory scope of representation language for the Hastings College of Law.

The University of California scope language excludes, among other things:

> Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this paragraph. If the academic senate determines that any matter in this paragraph should be within the scope of representation, or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.

> All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with employees or employee organization on any matter outside the scope of representation (Sec. 3561-q).

Although the statutory language begins to exclude certain matters from the scope of representation, the Academic Senate is able to broaden the scope to include academic governance and peer review questions whenever it so desires. Since the faculty bargaining units and the memberships of the Academic Senates are likely to be very similar, this option presents some intriguing possibilities. Even if the Senates choose to do nothing to expand the scope of representation, the exclusive representative for a faculty unit has the right to be consulted on every governance and peer review issue that arises even though these issues are not within the scope of representation of the exclusive agent. The distinction between "meeting and conferring" and "meeting and consulting" could easily become purely academic.

The attempt to establish a reserved management rights clause in the second paragraph of the HEERA scope section could prove to be interesting. It is too early to tell whether the faculty will choose to organize and if they choose to organize, whether or not the statutory language on management rights will have any impact on the collective bargaining process and its outcomes.

Bargaining Units

Article 6 in HEERA deals with unit determinations. The statute (a) forbids a mixed unit of peace officers and other employees (Sec. 3579-f); (b) handles skilled craft employees and members of the Academic Senate units with separate campus possibilities (Sec. 3579-d and e); (c) presumes, subject to refutation, that professional and non-professional employees should not be in the same unit (Sec. 3579-b); and (d) establishes a rebuttable presumption that all employees within an occupational group should be included in a single representation unit (Sec. 3579-c).

Skilled craft employees and members of the Academic Senate are not covered by the systemwide presumption. Skilled craft employees may petition for a single unit per campus or Lawrence Laboratory so long as the proposed unit contains all the skilled craft employees at a campus or Laboratory. Senate members may be in a single statewide unit or in a separate divisional (campus) unit. If Senate members opt to organize campus-by-campus, then whenever thirty-five percent (35%) of the eligible members of the Senate are represented by an exclusive representative the Public Employment Relations Board (PERB), upon petition, would conduct a systemwide election within the Academic Senate throughout the University of California.

PERB began to conduct unit determination hearings within the University of California in March, 1980. The hearings are expected to continue through the summer and into the fall. One hearing officer is conducting a hearing for all professional employees of the University outside of the Academic Senate. A second PERB hearing officer is conducting a hearing for all non-professional staff and technical employees. The University of California administration is arguing for a small number of large, systemwide units. Most of the unions have asked for small, campus-based units. Forty-seven petitions for Certification and fourteen Requests for Recognition are being heard by the two PERB officials.

Members of the Academic Senate at the Berkeley, Los Angeles, Riverside and Santa Cruz campuses of the University of California have all filed Petitions for Certification with PERB seeking divisional (campus) units.

After a series of discussions by members of the University administration and officials of the Berkeley Faculty Association, agreement was reached on an appropriate unit for the Berkeley Academic Senate. Similar discussions are expected to yield similar results at the other campuses of the University of California where members of the faculty have filed petitions for certification.

Department Chairpersons

Although there were some initial differences of opinion between the parties with regard to the Academic Senate unit for the Berkeley campus, the parties did not disagree on the placement of chairs. From the first discussion of possible units for the Senate membership, both the University administration and the officers of the Faculty Association agreed that department chairs should be in the Academic Senate unit with the faculty.

The University administration decided not to try to exclude department chairs from the faculty unit after studying the statute and discussing whatever options appeared to be practical.

HEERA speaks to chairs in the definitions of managerial and supervisory employees:

> 'Managerial employee' means any employee having significant responsibilities for formulating or administering policies and programs. No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participate in decisions with respect to courses, curriculum, personnel and other matters of educational policy. A *department chair* or head of a similar academic unit or program who performs the foregoing duties *primarily on behalf of the members* of the academic unit or program *shall not be deemed a managerial employee* solely because of such duties (Sec. 3562-l; emphasis added).

> 'Supervisory employee' means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. With respect to faculty or academic employees any *department* chair, head of a similar academic unit or program, or other employee who performs the foregoing duties *primarily in the interest of and on behalf of the* members of the *academic department*, unit or program *shall not be deemed a supervisory employee* solely because of such duties; provided that, with respect to the University of California and Hastings College of Law there shall be a rebuttable presumption that such an individual appointed by the employer to an indefinite term shall be deemed to be a supervisor. *Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees* (Sec. 3580.3; emphasis added).

In contrast to the U. C. decision, the California State University and College System decided to exclude department chairs. A PERB Hearing Officer will recommend placement for CSUC department chairs when he rules on other academic unit questions raised in the CSUC academic unit hearings. Those hearings began in the late winter, 1980 and a Hearing Officer's Recommended Decision is not expected before early 1981.

Supervisors

The statute devotes eleven sections to defining supervisors, limiting the interaction between supervisors and rank and file employees, granting organizing rights to supervisors, but not granting supervisors the same collective bargaining rights as non-supervisory employees. Supervisors must be satisfied with a meet and consult approach which does not lead to a memorandum of understanding:

> The higher education employer shall meet and confer with representatives of employee organizations upon request. Meet and confer means that they shall consider as fully as the employer deems reasonable such presentations as are made by the employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action (Sec. 3581.4).

In defining a supervisory employee as "any individual, regardless of the job description or title having authority, in the interest of the employer, to. . . .", the California statute appears to use fairly standard labor relations language. The reference to faculty and academic employees had serious impact on the University of California beyond the issue of department chairs. The U. C. administration and the Berkeley Faculty Association each reviewed all of the individuals serving as Assistant and Associate Deans and each of the Directors of the Organized Research Units on the Berkeley campus. The individuals were reviewed on the basis of what each present incumbent actually did and how the specific duties and responsibilities of the campus administrators were carried out. After several discussions between the parties decisions were made to include or exclude Berkeley campus administrators. In general, it was agreed that, on the basis of what they actually did, Assistant Deans would be included in the faculty unit and Associate Deans would be excluded. About 20 percent of the fifty ORU Directors on the Berkeley campus, or administratively responsible to the Berkeley campus, were excluded from the Berkeley Academic Senate unit. It is expected that similar discussions later this year at Los Angeles, Riverside and Santa Cruz campuses will result in decisions which will follow the pattern set at Berkeley.

Students

HEERA contains language which, under certain circumstances, seems to exclude students who work for the University. Section 3561-f, which defines employee for representation purposes states, in part:

> . . . The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

The Physicians National Housestaff Association (PNHA) tested this language early in July, 1979, when it filed the first unfair labor practice (ULP) charge against the University of California under HEERA. The University, relying on the language of Section 3561-f, cancelled the dues check-off privileges of PNHA with the effective date of HEERA (7/1/79) on the theory that only employee organizations were entitled to dues check-off. PNHA filed the ULP (SF-CE-1-H; 7/20/79) claiming that the language of HEERA did not affect the employee status of PNHA members. A PERB Hearing Officer listened to the arguments of the parties in a formal hearing in October 1979. In April 1980, the Hearing Officer's recommended decision stated that Housestaff were not employees within the meaning of HEERA so that the suspension of check-off privileges for PNHA did not constitute an unfair labor practice. PERB has not acted upon the Hearing Officer's recommended decision.

Other HEERA language concerning students grants them limited access to the bargaining table:

> (a) Subject to provisions of subdivision (d), in all meeting and conferring between higher education employers and employee organizations representing student service or academic personnel, a student representative shall have the right to be notified in writing by the employer and the employee organizations of the issues under discussion. A student representative shall have the right to be present and comment at reasonable times during meeting and conferring between the employer and such employee organizations.
>
> (b) The student representative shall be provided access to all documents exchanged between the parties pertaining to the meeting and conferring and shall have the right to have an aide present during all meetings; in the case of mediation of impasses, the student representative shall have an opportunity at reasonable times to comment to the mediator on impasse issues; and shall be free from coercion or reprisals in the exercise of his or her rights as set forth in this section.
>
> (c) The student representative shall respect and maintain the rules governing confidentiality as they pertain to all parties involved in the meeting and conferring. Violations of this provision shall result in the termination of student involvement for the remainder of such meeting and conferring, and such other remedy, if any, deemed appropriate by the board.
>
> (d) For purposes of this section, a student representative shall be designated by the official student body association, if any, of the higher education employer, or segment thereof, engaged in meeting and conferring. If no student body association exists, the students may elect and designate a representative for the purposes of this section (Sec. 3597).

Until the actual meeting and conferring process is underway, it will not be possible to assess what impact these sections will have on the initial demands of the parties, their postures and activity at the bargaining table, the use of the impasse machinery and other facets of the collective bargaining process. An early hurdle may come in the dispute over student participation in bargaining involving the University police force.

Since HEERA allows a unit of peace officers without any other employees and since the Statewide University Police Association (SUPA) has filed for a unit of police within the University, it is expected that an election will be conducted in the summer of 1980 in a police unit. If the union is successful in obtaining representational rights for rank and file police officers, then formal bargaining would begin in the spring, 1981. Police union spokespersons and officials of the student government have announced positions favoring student involvement if police bargaining should begin. The University may well take the position that student service language in the HEERA statute should be construed narrowly to mean counseling and other traditional student services but not to include police. PERB may have to settle this dispute, should it arise, before the formal police bargaining could get underway. The statute does not appear to allow for any narrow interpretation of student participation when academic employee bargaining is involved. The presence of students at the academic bargaining table has not been raised as an issue in any of campus Academic Senate unit discussions.

Summary

The statute in California presents several unusual situations. One section of the law provides that the parties at the bargaining table can reach agreements which will supersede existing State laws. No one is sure what this section means. Someone will first have to bargain a memorandum of understanding which alters State law and that process will have to survive a court challenge before we will know where we stand.

Some Californians are predicting an early legislative demise for the current section of HEERA dealing with organizational security. Under the existing HEERA language the parties may only negotiate a maintenance of membership arrangement. Those who claim to know are predicting an agency shop section will replace the maintenance of membership provision during the 1981 session of the legislature. In another two or three years it will be possible for someone to look back on the early efforts of the parties under HEERA and reach certain conclusions. For now, we are too close to the situation and too busy simply beginning to cope with the law to be able to clearly understand how the law is affecting employers and employees.

* * * * *

Editor's note: Faculty at the University of California at Berkeley rejected bargaining in June 1980 when the no-representation choice received 532 votes to 477 for the Berkeley Faculty Association (AAUP). More than 500 members of the Berkeley Academic Senate unit chose not to vote. In November 1980, faculty at UCLA and Santa Cruz voted inconclusively. PERB will conduct runoff elections on both campuses in February 1981.

	UCLA	Santa Cruz
No representation	688	74
Faculty Association	625 (Independent)	82 (AAUP)
American Fed. of Teachers	216	49
Not voting	721	90

In August, 1979, SUPA won an election for UC peace officers (102-39).

12. NEW TECHNIQUES OF CONFLICT RESOLUTION: INTEREST ARBITRATION IN IOWA

Robert Grant

Director of Employment Relations
Iowa Board of Regents

During 1978 the faculties of a number of junior colleges or community colleges and four-year colleges and universities, including the University of Bridgeport and Austin University, went on strike over terms and conditions of their employment. In 1979, strikes occurred at the University of Rhode Island, Hofstra University, Fairleigh Dickinson University, the University of Cincinnati and the Brooklyn Campus of Long Island University. These strikes lasted, in some cases, just a few days while others remained out for weeks. In contrast, on February 28 and March 1, 1979, the dispute over salaries between the University of Northern Iowa (UNI) and the UNI-United Faculty (NEA/AAUP) was resolved by *compulsory* and *binding interest arbitration* a first in the U.S. for a university faculty under a statute which prohibits strikes among public employees. For those not familiar with the term, "*interest* arbitration" is the procedure used to resolve the terms of a contract while *rights* arbitration is the mechanism for resolving disputes which arise under an existing contract.

Although this arbitration attracted little attention in the news media, it probably is the most significant event in collective bargaining in 1979, since it constitutes a major step forward in the art of resolving disputes with faculties at public universities. Up to this point, some states, such as Minnesota, have permitted voluntary (at the instance of the public employer) and binding interest arbitration for public employee disputes, and many require advisory arbitration exemplified by fact-finding procedures, while a few states have, for some time now, required binding interest arbitration for the resolution of police and fire contracts as well as the contracts of those engaged in essential municipal services. However, in 1974, the Iowa legislature became the first in the nation to pass a comprehensive collective bargaining act which required binding interest arbitration for *all* public employees as the final step for the resolution of impasses in their collective negotiations.

Background Events

The Iowa Public Employment Relations Act became effective for state employees, including the faculties at Iowa's three public universities, on July 1, 1976. In December 1976, the faculty at UNI organized and the first two-year agreement was successfully negotiated by the parties without resort to the arbitration procedures provided for in the Iowa PERA. In 1979, however, the parties hung up on the issue of salary increases which included the salary distribution system, and Neil Bernstein, Professor of Law at Washington University, St. Louis, Missouri, was called upon to arbitrate this dispute.

I came to Iowa at the end of 1976 from New York to become the first Director of Employment Relations for the Iowa State Board of Regents, convinced that the state legislature had made a drastic mistake. After all, binding and compulsory interest arbitration takes control over public enterprises from duly-elected or appointed public officials. It, indirectly, gives to the neutral the power to tax since the PERA directly gives the arbitrator the power to establish a level of public expense – a third party who is neither elected nor appointed (indeed, most arbitrators are from out of state) and is, therefore, not accountable for his or her actions to the taxpaying public. While these concerns continue, my attitude has undergone a metamorphosis caused by the fact that the PERA appears to be working. Although there presently are approximately 724 collective bargaining agreements in force and effect among state employees, the faculty at the University of Northern Iowa, and various county, town and school district employees, there has not been one strike by any public employee union since the passage of the act in 1974. Furthermore, last year only 3.27 percent of the contract disputes were resolved ultimately by arbitration while, this year, only 3.87 percent of the units have resorted to arbitration, and those awards have not been extravagant but have tended to be economically conservative.

Because the Iowa experiment in extending and refining the interest arbitration process may have found a more civilized and more workable approach for the resolution of disputes in the public sector generally and in the university community, in particular, which offers a better guarantee for the uninterrupted delivery of public services within the reasonable ability of the taxpayer to afford, you may find an explanation of this process useful and informative. However, I would emphasize at the outset that all the evidence is not yet in and many of the conclusions reached herein must be considered only tentative, since the act has not yet been fully tested.

The Statute

Section 22(1) of the Public Employment Relations Act of 1974 mandates the following procedure after fact-finding has failed:

> If an impasse persists after the findings of fact and recommendations are made public by the fact-finder, the parties may continue to negotiate or, the public employment relations board shall have the power, upon request of either party, to arrange for arbitration, which shall be binding. The request for arbitration shall be in writing and a copy of the request shall be served upon the other party.

Section 17(10) of the Act declares:

> The negotiation of a proposed collective bargaining agreement by representatives of a state public employer and a state employee organization shall be complete not later than March 15 of the year when the agreement is to become effective. The board shall provide, by rule, a date on which any impasse item must be submitted to binding arbitration and for such other procedures as deemed necessary to provide for the completion of negotiations of proposed state collective bargaining agreements not later than March 15. The date selected for the mandatory submission of impasse items to binding arbitration shall be sufficiently in advance of March 15 to insure that the arbitrators' decision can be reasonably made before March 15.

In furtherance of that legislative directive and absent independent procedures, Rule 7.6(3) of the PERB, regarding State employees (including those at the public universities), requires that a "request for binding arbitration must be filed by February 1, and any impasse must be submitted to the arbitrator(s), and hearing concluded no later than February 28."

The March 15 deadline is unquestionably mandatory for State contracts and has been held recently to be jurisdictional for other public employees as well. (*Maquoketa Valley Education Assn. v. Maquoketa Valley Community School District*, 279 N.W. 2d 510 (1979).

The purpose and design of these provisions of law is two-fold. Firstly, the statute contemplates the orderly process of public sector negotiations which conforms to the budget-making process of the public employer. Secondly, it is intended that these deadlines build the same kind of pressure that a strike deadline would build in the dynamics of private sector bargaining.

I might add that this requirement avoids the complaint raised by Robert Doherty and Mary Gallo of the New York State School of Industrial and Labor Relations at Cornell University in their study of compulsory interest arbitration for police and fire contracts and other essential services under New York's Taylor Law. As reported in Government Employee Relations Report, April 2, 1979 (804 GERR 10, at page 12):

> The study finds one of the most disturbing features of the present arrangement to be the time taken to complete the process, noting that it took a long time under the 1974 amendments and even longer under those of 1977, and "it does not seem to us to be conducive to sound employer-employee relations that disputes should be allowed to linger for an average of 316 days."
>
> Public sector bargaining laws in 28 states contain interest arbitration provisions, the study points out, and 18 states place time limits on the parties and arbitrators to hasten the process. However, the limits are not always adhered to, although limits are strictly enforced in Iowa, and rapid movement from mediation to factfinding to arbitration "seems to encourage the parties to settle early on their own."

Section 22(2) of the Act requires:

> Each party shall submit to the board within four days of request a final offer on the impasse items with proof of service of a copy upon the other party. Each party shall also submit a copy of a draft of the proposed collective bargaining agreement to the extent to which agreement has been reached and the name of its selected arbitrator. The parties may continue to negotiate all offers until an agreement is reached or a decision rendered by the panel of arbitrators.
>
> As an alternative procedure, the two parties may agree to submit the dispute to a single arbitrator. If the parties cannot agree on the arbitrator within four days, the selection shall be made pursuant to subsection 5. The full costs of arbitration under this provision shall be shared equally by the parties to the dispute.

Unlike the fact-finding proposals, the final offer on each impasse item cannot be changed or amended before the arbitrator. Although the parties may continue to negotiate both mandatory and permissive matters until the arbitrator's award has been issued. In short, the parties are "locked in" to their final offers in writing exchanged four days after the demand for the arbitration (i.e., February 5, as the last day for State employees). This is significant since Section 22(3) continues that:

> The submission of the impasse items to the arbitrators shall be limited to those issues that had been considered by the fact-finder and upon which the parties have not reached agreement. With respect to each such item, the arbitration board award shall be restricted to the final offers on each impasse item submitted by the parties to the arbitration board or to the recommendation of the fact-finder on each impasse item.

Section 22(11) PERA emphasizes:

> A majority of the panel of arbitrators shall select within fifteen days after its first meeting the most reasonable offer, in its judgment, of the final offers on each impasse item submitted by the parties, or the recommendations of the fact-finder on each impasse item.

Again, the procedure is designed to narrow the issues at impasse by restricting the submission to the arbitrator of those matters previously considered by a fact-finder. Of course, by this time, each impasse item must have been presented by each party to the other in the course of negotiations and only mandatory subjects may be considered. (Obviously, where the parties bypass fact-finding, as they may, this requirement is inapplicable).

Again, unlike fact-finding, the arbitrator may not fashion his/her award; rather his/her discretion is limited to the selection of the final and best offer of either party or the fact-finder's recommendation on each impasse item. This "forced choice" procedure is designed to force the parties to reveal their most reasonable and final position in the written exchange and to avoid the perceived tendency of neutrals to find a middle ground.

Defining Impasse Items

Early in the history of the Act the meaning of the words "impasse item" was raised. If, on the one hand, "impasse item" was to mean every paragraph, sentence, phrase, or word, then the objective of the procedure to narrow the issues at impasse at each step in the process would be undermined. On the other hand, final-package arbitration was a choice not made by the legislature in the design of the impasse process. For example, may a faculty union demand a salary increase separate and distinct from a demand for a salary schedule or index or other salary distribution system? Indeed, can separate demands be made for longevity pay, additional compensation as additional graduate work is completed, and provisions for "red circling" for those at the top of a range; can separate demands be made for workload formulae and salary or overtime compensation? If each matter can be fractionalized, then its selection by the arbitrator stands or falls on the reasonableness of a very narrow proposal, and I submit that the incentive to become more reasonable on a broader range of issues is diminished. If, however, similar issues are packaged under general subjects, the reasonableness of a final offer on "wages" as defined in Section 9 of the Act, for example, which must include the demand for a salary increase, the salary distribution system and the workload for base pay, will be determined by the reasonableness of that limited package as a whole.

The question was initially presented in a request for a declaratory ruling from PERB by the West Des Moines Education Association, in 1976. The Board held, in PERB Case No. 805, that:

> In Rule 1.6(5) we defined an impasse item as follows:
> 'Impasse item' means any term which was a subject of negotiations and proposed to be included in a collective bargaining agreement upon which the parties have failed to reach agreement in the course of negotiations. . . .
>
> The primary purpose in promulgating Rule 1.6(5) was to ensure that the *subject* submitted to arbitration was one upon which the parties had an opportunity to negotiate prior to arbitration. It was not intended to specify with precision the literal scope of an impasse item, be that a word, sentence, paragraph, section, chapter, or article.
>
> In attempting to provide some guideline as to the pragmatic usage of impasse items in impasse resolution, we first recognize that the Act provided for a specific type of finality – final offer arbitration.
>
> Known also as last offer arbitration, or forced-choice arbitration, this impasse resolution mechanism is designed to encourage hard bargaining by the parties before they resort to arbitration. Final offer interest arbitration enables 'the parties to retain maximum participation all the way up to finalization of a decision with minimum exercise of power by a third party.' Thus, the 'emphasis in last offer is for the parties to reach agreement short of arbitration, but failing that the goal of the procedure is to ensure that the offers will be reasonable and afford the arbitrator little discretion.'
>
> Because the purpose of this procedure is to enhance the reasonableness of the parties' offers and, hence, reduce the discretion of an arbitrator, it is our opinion that anything which serves to fractionalize a particular subject of negotiations will likely erode the effectiveness of the procedure. Thus, we believe that the parties are required to submit to an arbitrator their final offer on a subject category basis, and that each subject category submitted shall constitute an impasse item.*
>
> We recognize that in any given bargaining situation the offers of the parties may differ in approach or content, and that within or among those offers it may be difficult to specifically identify the 'impasse item.' For example, one party may propose seniority as a factor for consideration separately in a number of different subject areas, whereas another party may propose one seniority offer which by its terms would apply to other subject areas. Because the determination of what constitutes an impasse item will necessarily involve a discretionary decision based upon the facts of a particular bargaining situation, we believe that determination can best be made by the arbitrators, who alone or in combination are in the best position to do so having heard the evidence and positions of the parties.
>
> *By referring to an impasse item as a subject category, we do not mean to imply that only those subjects of bargaining set forth in Section 9 of the Act will qualify as an impasse item, nor that different Section 9 subjects of bargaining may not be interrelated within a subject category.

Court Interpretation

However, in *West Des Moines Education Assn. v. PERB Equity* No. CE6-3341 (Polk Co. Dist. Ct., Feb. 1977), the District Court reversed, holding that "the phrase 'impasse item' referred to any word, clause, phrase, sentence, or paragraph upon which the parties to arbitration under the Act were in disagreement. . . ." On appeal the Iowa Supreme Court, in *West Des Moines Education Assn. v. PERB*, 266 N.W. 2d 118 (Iowa 1978), reversed the lower court. The high court held that:

> . . .The phrase 'impasse' item is not defined in chapter 20, *The Code*. The parties here do not dispute the meaning of the word 'impasse.' They apparently accept the meaning given the word in the Act: 'Impasse' means the failure of a public employer and the employee organization to reach agreement in the course of negotiations.' Section 20.3(10), *The Code*, 1975. Their disagreement centers around the word 'item.' The Association contends the word refers to any word, clause, phrase, sentence, or paragraph while the other parties here argue it refers to a subject category of negotiable items. . . .
>
> . . .If the objectives of final offer arbitration are to be carried out it is plain they will best be carried out through a system whereby the parties must make final offers on subject categories.
>
> Chapter 20 contains provisions which indicate to us the legislature intended to carry out the objectives of final offer arbitration through a system mandating subject category final offers.
>
> Section 20.9 delineates the scope of negotiations between the parties. . . .
>
> . . .In our system the fact-finder is a neutral who would be expected to recommend to the arbitrator the most reasonable offer. The arbitrator, mindful of the fact-finder's neutrality, will often be prone to choosing the fact-finder's position in making his award. This propensity will force the parties to make more reasonable offers because the party who wins over the fact-finder will enter arbitration with a powerful ally. The party which fails to have the fact-finder recommend its position will be forced to think long and hard before it continues on to arbitration. . . .
>
> . . .It is our view the legislature in adopting final offer arbitration between public employers and employees intended to provide for the carrying out of all the objectives of such arbitration through a system mandating subject category final offers. The Association's reliance upon the Michigan experience is misplaced.
>
> In order to carry out this legislative intent we interpret the phrase 'impasse item' means subject categories which requires the parties to submit to an arbitrator their final offer on a subject category basis. Each subject category submitted shall constitute an impasse item.

As sometimes happens, the court answered more than it was asked, and was far more precise and, therefore, more restrictive than PERB, since the court has virtually said (although not explicitly) that the subject categories are the seventeen mandatory subjects of bargaining specifically listed under Section 9 of the Act. The PERB stopped short of that conclusion.

The Arbitration Result

In its final and best offer on the sole impasse item, "salaries," the Board of Regents and the University of Northern Iowa had offered an average salary increase of 7 percent per capita for continuing faculty in each of two years, together with the continuation of the salary distribution system which had been negotiated the year before, pursuant to a Memorandum of Understanding which required that:

> The United Faculty and the Board of Regents each affirms its deep and continuing commitment to the principles of merit, when fairly implemented, and each recognizes the need to promote quality and excellence in higher education by providing that a substantial component of any funds hereafter provided, if any, for salary increases and/or any other economic benefits for

> the members of this bargaining unit, shall be allocated for individual salary adjustments to be distributed by the Board of Regents, at its discretion, which sum shall not be less than thirty percent (30%) of the funds so provided and which distribution shall not be subject to any grievance procedure. . . .

The UNI United Faculty demanded an 8.5 percent salary increase for the first year of the agreement and 6.9 percent for the second. However, tied to that demand (which, standing alone, I believe the arbitrator would have selected) was a confusing deviation from the salary distribution system which the arbitrator found was designed to undercut the substantial merit principles negotiated into the first contract. In selecting the final and best offer of the Board of Regents, the arbitrator, Mr. Neil Bernstein, stated that "the dollar amounts of the alternative proposals were not a crucial factor in the outcome. . . ." He indicated that his "decision was based, instead, on other features of the two proposals. . . ." With respect to the across-the-board component of the U.F.'s final offer on "wages," he observed that "the Faculty's proposal appears to reflect a philosophy that salary increments for meritorious service are less valuable and desirable than increases based solely on length of service. The practical result is that the Faculty's proposal gives a greater proportion of the available money to those who were considered to be below-average performers in the past than does the Board offer. I prefer the philosophy of the Board's offer and find that offer to be more reasonable in this respect. . . ." With respect to the merit component of the U.F.'s final offer, he noted that "I consider nonmerit allocations of this magnitude to be inconsistent with the Memorandum of Understanding and contrary to sound compensation philosophy for a university faculty. . . ." And, finally, with regard to the U.F.'s proposal for promotion increases, the arbitrator concluded that "this portion of the Faculty's proposal appears to be a further illustration of the tendency of the Faculty's final offer to denigrate the commitment to merit compensation, which tendency is the major element in the Faculty proposal that led me to conclude it was less reasonable than the Article advocated by the Board. . . ."

How Binding Are Awards?

The Iowa PERA contains several fail-safe provisions for public employers generally. Section 17.6 states:

> No collective bargaining agreement or arbitrator's decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending or budget or would substantially impair or limit the performance of any statutory duty by the public employer.

Section 28 reads:

> A provision of the Code which is inconsistent with any term or condition of a collective bargaining agreement which is made final under this chapter shall supersede the term or condition of the collective bargaining agreement unless otherwise provided by the General Assembly.

Neither of these sections has been tested in the courts of Iowa since, insofar as I am aware, there has been no situation where the public employer has failed to fund an agreement or an arbitrator's award. Neither has the related issue of the constitutionality of the Iowa PERA been tested thus far in this state.

However, last year, the Supreme Court of Minnesota was called upon to determine if an arbitrator's award, which purported to bind both parties, could bind the state legislature which had refused to fund the economic award made by the arbitrator. Minnesota has a statute which permits binding arbitration at the option of the public employer. The Minnesota Community College Faculty Association and the Minnesota Community College System had entered negotiations for a contract for the 1977-79 biennium and had reached impasse on salaries (and another issue) in the spring of 1977. The public employer agreed to binding arbitration on the issue of salaries and in April 1977, following a hearing, the arbitration panel awarded a 10.5 percent total economic package for the first year of the agreement and a 7.5 percent economic package for the second year.

Thereafter the Minnesota State Legislature refused to fund the "binding" arbitration award but modified the award by reducing it to 7 percent in each year. The MCCFA charged the state with an unfair labor practice, since Section 179.68(2)(9) of the Minnesota statute expressly makes it an unfair labor practice and prohibits employers from "refusing to comply with the provisions of a valid decision of a binding arbitration panel. . . ." The district court held in *Minnesota Education Association and Minnesota Community College Faculty Association v. the State of Minnesota et al.*, file No. 422630 (Second Judicial District, January 30, 1979), that:

> The arbitration award concerning wages of the professional staff of the State Community College system represented by the MCCFA for the biennium 1977-1979 issued on May 3, 1977, was a valid final and binding arbitration decision of an arbitration panel pursuant to PELRA.
>
> By failing to implement the final and binding wage arbitration award of May 3, 1977, the State of Minnesota, as a public employer, committed an unfair labor practice specifically prohibited by PELRA. . . .
>
> There is nothing in the legislative history of PELRA which would support any conclusion except that all public employees are entitled to have final and binding arbitration awards honored by their employers once the public employer has determined to submit to arbitration. Interest arbitration under the statute would become meaningless if state employees were permitted access to it but then denied any final and binding effect of the award once rendered. Similarly, if an interest arbitration award was rendered meaningless in that fashion, the limited right to strike under PELRA Section 179.64, Subd. 7, would be effectively abrogated, since under that section nonessential employees may only strike if their public employer refuses to submit to interest arbitration or refuses to honor an interest arbitration award. All of these factors would severly undermine the duty of the state as a public employer to bargain in good faith since the state could always agree to submit to arbitration and honor what it considered to be a favorable arbitration award, and reject or modify what it considered to be an unfavorable arbitration award. . . .
>
> Clearly, the state has a legitimate interest in reviewing and controlling commitments made in its behalf by state negotiators. However, the same limitations and concerns are not present in the case of binding arbitration since under those circumstances the parties knowingly and voluntarily agree to submit outstanding disputes to arbitration with the knowledge and expectation that both parties will be bound by the result. The parties, in essence, ratify the

> terms and conditions of the arbitration decision before it is rendered by virtue of the submission of the dispute to the arbitration panel. . . .

On appeal the Supreme Court of Minnesota in *Michigan Education Association et ano. v. the State of Minnesota et al.*, 282 N.W. 2d 915 (1979), reversed the lower court, stating:

> Thus, it appears that the 1973 revisions were designed to make arbitration binding on all public employers. It seems, however, that the Legislature exempted itself from that requirement by binding only the state negotiators but not itself. In other words, the executive branch is bound, but the legislative branch reserved the right to review all contracts. Also, Sec. 179.74, subd. 5, as enacted in its current form in 1973. provides that only the financial portions of labor contracts would receive legislative review. This is consistent with a legislative belief that the duty to determine the size of appropriations could not be delegated away.
>
> There is no doubt that everyone involved with the process of collective bargaining with state employees has assumed all along that the Legislature did, in 1973, reserve this right to modify all contracts, including arbitration awards. The author of the 1973 amendments to the PELRA, Representative LaVoy, in explaining Sec. 179.74, subd. 5, to the House Governmental Operations Committee stated:
>
>> "What we are saying here is that the Legislature, being the body which has to appropriate funds for financing our state and running our state, must make the final decision on all wages and economic fringe benefits to be paid to our state public employees. We still retain that option."
>
> . . .The policy reasons behind this retention of legislative authority over otherwise binding arbitration awards are apparent – the necessity for the representatives of the people to retain final control over appropriations and to apply uniform budgetary considerations to numerous bargaining units. Consequently, so we are informed, not a single state legislature in the country is bound by arbitration awards to state employees. Faced with this weight of historical evidence, policy factors, and universal practice, it is not for us to rewrite the PELRA by adopting the undeniably strained interpretation advocated by the MCCFA, even though that group strenuously complains of unfair treatment.
>
> Having decided Minn. St. 179.74, subd. 5 reserves the right of legislative review and modification of arbitration awards involving state employees, we must consider the MCCFA's claim that the Legislature has denied equal protection to state employees by treating them differently than other public employees. Such a legislative classification, which does not involve a fundamental personal right or a suspect classification, will be upheld if it has some rational basis. McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); City of New Orleans v. Dukes, 427 U.C. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976). Since, as pointed out by the MCCFA, there is no distinction between the jobs performed by state and non-state public employees, the inquiry must be whether there is a rational basis for treating the two groups differently solely on the basis of their employer. The state offers three such bases, all of which we consider adequate: 1) Governmental power at the state level is separated into distinct branches. In other words, the Legislature may properly decline to be bound in its legislative function by the employees of the executive branch. This separation is not present at the local level. 2) The size and complexity of state government require centralized control. 3) The Legislature's special constitutional responsibilities prevent it from binding itself as to appropriations.

> We find the third rationale particularly compelling. As the source of sovereign governmental power, the Legislature is able to bind all other groups except a subsequent legislature, and for this reason must necessarily reserve the right to review future arbitration awards of state employees. Consequently, there is no denial of equal protection inherent in Minn. St. 179.74, subd. 5, as interpreted herein. . . .

While it is clear that the act of appropriating monies raised by taxes is a non-delegable duty of the state legislature, this case does not entirely answer the question. Most large state universities have independent sources of income, including tuition and gifts and grants from various sources which are dispersed by the governing boards of those institutions. Whether arbitrators' awards can bind those funds is an unanswered question and must be left to the courts in the months to come.

Conclusion

It is a relatively simple matter to explain how the Iowa experiment in public sector collective bargaining functions and to describe what the limited experience has been under the act thus far. However, it is little more than educated guesswork to draw conclusions about *why* the law has functioned so effectively in an area as nebulous and volatile as collective bargaining in the public sector. With that caveat I attempt some observations.

One reason why no strikes or lockouts have occurred among public employees since the passage of the Iowa PERA in 1974 is that, up to this point, everyone has abided by the decisions handed down by the arbitrators. As I indicated earlier, we have not had a case in this state, as of this time, where a public employer has refused to fund an agreement or an arbitrator's award.

Secondly, I would opine that the unions who fought hard to get compulsory and binding arbitration into the PERA are reluctant to reject unfavorable decisions reached by neutrals regarding the terms and conditions of employment for public employees lest the entire system be abandoned by the legislature.

Furthermore, final offer arbitration forces the parties to make final offers within a range of reasonableness so that in the event that you lose in arbitration, your loss is not devastating but merely disappointing. I also believe that the final offer approach is the reason why so few cases ultimately go on to arbitration.

Finally, when adverse decisions are made by third party neutrals and are supported by some rationale, the anger necessary to motivate union members to violate the law and risk the penalties for a strike is defused. When public employees do not get what they want from the arbitrator, they cannot credibly claim abuse, which is the usual charge leveled at the public employer when terms and conditions of employment are unilaterally established upon the failure to reach agreement.

Compulsory and binding interest arbitration is not necessarily a panacea for labor troubles in public employment or at the private university. But the evidence is building that that approach has been an acceptable alternative to the strike under the Iowa statute. The act has worked. Its success, then, would suggest that at least interest arbitration ought to be viewed by others as a viable option, particularly in difficult negotiations where the strike is viewed as an unhappy alternative. I have, therefore, attached suggested language which the private universities may wish to use to resolve current contract negotiations. I would observe that public universities probably need legislative authority to adopt compulsory and binding interest arbitration to resolve their labor disputes.

The Iowa PERA stands today as a model for other states to follow as well as other private employers, including private universities. It is a tribute to the progressive and innovative thinking of the legislature of the state of Iowa.

Finally, Governor Robert D. Ray deserves much credit for his support of the act and for its effective implementation following its passage.

APPENDIX A
SAMPLE INTEREST ARBITRATION CLAUSE

As the final step in resolving all outstanding disputes (in connection with the renegotiation of this agreement before the expiration of the current term) the employer and the employee organization agree that:

1. The employer will not engage in any lockout upon the expiration of this agreement.
2. The employee organization will not engage in any strike or other job action upon the expiration of this agreement.
3. In the event that 60 days preceding the expiration of this agreement any mandatory subject of bargaining remains unresolved, the parties shall select a mutually agreeable arbitrator or, failing such agreement, shall request a list of three names from the American Arbitration Association and shall select the arbitrator by alternate striking not less than 45 days from the expiration of the current agreement; the first strike shall be determined by lot.
4. Twenty days preceding the expiration of this agreement, each party shall personally exchange its final written offer amending the current agreement which shall include only mandatory subjects of bargaining which remain unresolved, a copy of which shall be mailed to the arbitrator at the same time. Neither party may thereafter amend or modify its final offer except that items subsequently resolved may be deleted.
5. All other unresolved items may not be presented to the arbitrator nor hold up a final agreement although negotiations may continue on all matters until the receipt of the arbitrator's award.
6. Between 15 days and 10 days from the expiration of the current agreement, the arbitrator shall hold a hearing at which time the parties shall present evidence in support of their final offers.
7. The arbitrator shall initially determine all issues of procedure under this article and issues of negotiability and shall strike all non-mandatory subjects of bargaining. He/she shall then select the most reasonable final offer of either party as a total package without modification, except as above, giving the reasons therefor and shall mail his/her award to both parties by no later than the expiration of the current agreement, unless extended by the agreement of the parties.

8. The arbitrator shall base his/her award on the following criteria:
    a) Past collective bargaining contracts between the parties, including the bargaining that led up to such contracts.
    b) A comparison of wages, hours, and conditions of employment of the involved employees with those of other employees doing comparable work with similar skill and ability, giving consideration to factors peculiar to the area and the classifications involved.
    c) The interest, welfare, and mission of the institution involved, the ability of the institution involved, the ability of the employer to finance economic adjustments, and
    d) Any other relevant factor.
9. The award of the arbitrator shall be final and binding upon both parties and, together with those items previously agreed to, shall be deemed to be the contract between the parties for one year following the expiration of this agreement. This article must be expressly agreed to in order to be continued in the successor agreement.
10. The arbitrator's fee, together with his/her reasonable travel and lodging expenses and meals shall be shared by the parties. The cost of presenting a party's arbitration case shall be borne by that party.

13. FACULTY ACCOUNTABILITY — REALITY OR FANTASY?

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It's real all right, and it is getting more fantastic all the time.

Faculty performance has long been measured by the traditional standards of institutional service, teaching effectiveness and scholarly productivity. Some agreements list numbers of factors to be considered, but they can usually be subsumed under the three headings I have mentioned.

Faculty members sometimes complain that the criteria are not clear. What if peer teaching evaluations are only average, but student-evaluations are outstanding? How many articles must be published in what kinds of journals? Must I publish a book? The application of these standards is a subjective judgment, and contracts which have arbitration clauses should prohibit an arbitrator from substituting his judgment for the judgment rendered by the institution's academic review committees.

Current Issues

These standards may be communicated in a number of ways: in periodic distribution of policy statements by the president, the provost and the deans; in meetings between the dean and untenured staff members as they come within two to three years of tenure; and, most important, in the regular evaluation meetings provided for in the agreement and usually held between the faculty member and his chairperson.

Chairpersons are often reluctant to speak frankly with their colleagues concerning their shortcomings, a serious injustice to a faculty member who later fails to secure tenure. But there is an additional problem. What happens when a chairperson seriously disagrees with the dean or the provost about the value of a faculty member? The chairperson feels that the department has enough scholars and one young assistant professor is the best teacher the department has been able to recruit in the last six years. Besides, he has two book reviews in the bulletin of the English Department in a neighboring university. The chairperson will give the young faculty member a superior evaluation and make no mention of need for scholarly output.

Let us take this one step further and assume that we are in a college with a collective bargaining agreement which permits faculty members to obtain reasons for negative personnel actions. What is likely to happen? If the faculty member is told by the administration that the reason he did not receive tenure is that his scholarly output was found wanting, he is likely to file a grievance and he is certain to win. We will examine several situations like this later in this paper and analyze why academic judgments are overturned.

Giving Reasons for Personnel Decisions

The Board of Higher Education, now the Board of Trustees, of the City University of New York and the Professional Staff Congress/CUNY have negotiated two contract provisions which permit reasons to be given under certain circumstances. Section 9.9 provides that a faculty member who has been favorably recommended for reappointment or promotion by the highest level college personnel and budget (P&B) committee the right to request, from the college president, a statement of reasons if the president overturns the committee's favorable recommendation.[1]* The second provision, Section 9.10, permits an unsuccessful applicant in a matter involving failure to receive promotion, tenure or reappointment to secure reasons for the denial of his appeal. The reasons are understood to be those of the president.[2]

Before these articles were negotiated, grievances concerning failure to evaluate were not sustained by an arbitrator so long as there was substantial procedural compliance with the contract, in particular the article concerning faculty evaluation.[3] It was not necessary to find deficiencies in the faculty member's performance. The University was free to rely on its long-standing policy that reasons for nonreappointment need not be given. The Max-Kahn memorandum states:[4]

> Often the reasons have nothing to do with the candidate himself (he may indeed be satisfactory), but rather with the possibility that better candidates, with wider backgrounds, more versatility, or specialties which are more likely to be of use to the department in the years to come, may be available, and the department does not desire to foreclose the opportunity to attract such candidates.

City University procedures fulfill in almost all respects the American Association of University Professors (AAUP) *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments.*[5] In addition to coverage under an evaluation procedure, CUNY faculty may initiate an academic appeal for higher-level review of negative academic judgments, a right greater than that recommended by the AAUP *Statement.* That *Statement* provides, except for academic freedom questions, only for a determination that adequate consideration has been given and, if not, for a remand to the original decision-making body.[6]

Refusal to Give Reasons

The substantial point of difference between CUNY provisions and the AAUP *Statement* is in giving reasons, which even the AAUP grants with seeming reluctance first orally, if requested, and then in writing, if the faculty member so requests. Before arriving at its recommendation that reasons be given, the *Statement* reviews the now classic arguments pro and con. The University needs the widest possible latitude to recruit and retain the best qualified faculty. If reasons must be given, it may lead to the expectation that the decision-making bodies must justify their decisions and they may become reluctant to reach negative decisions and face the prospect of grievance procedures.

On the side of the faculty member, it is suggested that not giving reasons may protect his future career if the reason is damaging. On the other hand, if the faculty member learns the reasons for his nonrenewal, he may be able to remedy the situation, or he may learn that the reason has to do with institutional factors and not with his performance. Without reasons, the faculty member may assume improper motivations. Should he decide to pursue a review of his case, having reasons enables him to prepare effectively.[7]

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*Footnotes for this paper will be found on pp. 118-120.

Irwin A. Polishook, President of the Professional Staff Congress of the City University (PSC/CUNY), in addressing the question of reasons and the tradition of confidentiality, lists these arguments advanced against giving reasons: the confidentiality of the peer judgment process will be compromised and thereby the process itself, internecine struggles will be generated, and it is inconsistent with tradition. He counters these by asserting that peers should be held accountable for their decisions, that giving reasons lends credence and respect to the peer judgment process, that denying an individual the right to know the reasons for termination is an excessive price to pay for collegial peace; and that a new tradition – respect for the rights of the individual – must be accommodated into higher education.[8]

In 1973, Charles Bob Simpson, then Director of Higher Education for the National Educational Association, joined with the AAUP in favoring that reasons be given to probationary faculty whose contracts are not renewed.[9]

Judicial Position

There is ample legal support for a policy of no reasons for non-tenured faculty M. M. Chambers states that "for centuries all courts agreed that to be rid of the short-term employee all the governing board had to do was simply to allow his contract to expire."[10]

The Sixth Circuit Court of Appeals has stated: "A non-tenured teacher's interest in learning the reasons for non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers."[11]

In *Roth v. Board of Regents*, the Supreme Court held that the Fourteenth Amendment does not require that written reasons be given or that a hearing be held prior to the nonrenewal of a nontenured state college professor's contract.[12] One commentator agrees that the Roth and Sindermann decisions are likely to increase pressure for a negotiated contractual right to written reasons and review procedures patterned after AAUP policy.[13]

Legislative Action

There have been legislative attempts to guarantee that reasons be given on nonreappointment. In 1978, the New York State Legislature passed legislation requiring that any member of the instructional staff of the State University of New York or of the City University of New York denied tenure or reappointment be given a statement of reasons. The Governor, in vetoing the legislation, recited the arguments which had been presented to him and which are much the same as those we have reviewed. He singled out certain arguments: giving reasons would create an expectation of continuing employment and would lead to the testing of academic judgment in court; it is vital to preserve staffing flexibility prior to the award of tenure; and passage of the bill would remove the issue from the collective bargaining realm.[14]

In 1979, the Governor again vetoed a somewhat broader version of the 1978 bill for the same reasons.[15]

Contractual Approach

In the balance of this paper, I will discuss the safeguards provided for the faculty by Sections 9.9 and 9.10 of the CUNY-PSC agreement and their effect on job security. I will also review their impact on the president's ability to render an independent academic judgment, a responsibility clearly placed upon the president by the Bylaws of the Board of Trustees.[16] My method will be to review arbitration decisions involving these provisions. Although each decision by an arbitrator is applicable only to that case, the language of the decisions provides excellent guidance in predicting what will be acceptable compliance by the University.

Limitations placed upon the arbitrator's authority are stated in Section 20.5(b) of the Agreement:[17]

> (b) For purposes of this sub-paragraph, "academic judgment" shall mean the judgment of academic authorities including faculty, as defined by the Bylaws, and the Board (1) as to the procedures, criteria and information to be used in making determinations as to appointment, reappointment, promotions, and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance or of action based in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his own judgment therefore, provided that the Arbitrator may determine (i) that the action violates a term of this agreement or (ii) that it is not in accordance with the Bylaws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the Bylaws or written policies of the Board.

The burden is placed upon the grievant to demonstrate that his situation falls into one of these categories and that he was denied reappointment for impermissible reasons. Superior academic performance alone does not win the day. But, as we shall see from the following cases, once reasons are given, the burden of proof, as a practical matter, shifts to the college.

Effect of Presidential Reasons

The first matter arbitrated which concerned Section 9.9 was that of an Assistant Professor at Herbert H. Lehman College who was being considered for tenure.[18] The grievant had been favorably recommended by the College committees but the president decided against reappointment. Section 9.9 states:[19]

> When a College President determines not to make a recommendation to the Board of Higher Education for reappointment or promotion of a person recommended to him by a College P&B Committee or other appropriate body, the individual affected by that decision shall be notified of the Committee's favorable recommendation and of the President's decision. The notice shall not state the reasons for the President's action.

> Within 10 school days after receipt of the said notice, the affected individual may submit to the President a request, signed by him, for a statement of the reasons for the President's action. Within 10 school days after receipt of the request, the President shall furnish a written statement of his reasons to the affected employee.
>
> *The President shall not be required thereafter to justify his decision or his reasons.*" (Emphasis added)

Arbitrator Benjamin C. Roberts was asked to decide whether he would review a college president's decision or his reasons given under Section 9.9. It was the Board of Higher Education's position that once reasons were given by the president the president would not be required to justify those reasons and they could not be challenged or rebutted or used as evidence in an arbitration or court proceeding. The PSC's position was that the reasons were reviewable by the arbitrator.

Mr. Roberts concluded, based upon the language of Section 9.9, the language of the grievance article of the Agreement, Section 20.5(b), the history of the negotiations and the considerations of the fact-finders who were appointed by the New York State Public Employment Relations Board during contract negotiations, that an arbitrator could not review the president's decision or his reasons where this would require that the president justify his decision or his reasons. But Mr. Roberts also stated:[20]

> However, this finding should not be taken to mean that there cannot be any circumstances under which a grievance can be filed under Section 20.5 alleging arbitrary or discriminatory action by a President where reasons have been given pursuant to Section 9.9. The allegations and the proof may not require the President to justify his reasons or decision reversing a favorable College P&B decision. The reasons may on their face constitute a violation of a term of the Agreement or be contrary to or an arbitrary or discriminatory application of the Bylaws or written policies of the Board. The grievant may allege grounds extrinsic to the reasons given by the President, such as discrimination because of sex, etc.

Reason Must Not Be a Surprise

The Board began to see the full import of Mr. Roberts's words in the matter of an assistant professor at Richmond College.[21] The grievant had received favorable recommendations from the P&B Committees. The Acting Dean of Faculties, however, recommended to the president that the grievant not be granted tenure because, among other factors, "his scholarship had been essentially inadequate."[22] The grievant testified at the arbitration proceeding that he was never told that his research was inadequate or that his work was not acceptable until he had asked the Dean about his negative recommendation.

In furnishing reasons for his decision not to recommend the grievant for tenure, the president of the College stated:[23]

> In reviewing your case, I have concluded that your teaching performance has been good and your performance in service to the college has been minimally satisfactory. However, your commitment to aid performance in research and scholarship has been inadequate in light of the expectancies and needs of the College and its programs in the sciences.

> I have concluded in the exercise of my academic judgment that your lack of a serious research commitment is not counterbalanced by the quality of your other performance, and so have decided against recommending your appointment with tenure.

Arbitrator Robert L. Stutz did not have to venture into the proscribed area which protects the president from having to justify his decision or his reasons in order to find that this case involved an arbitrary application of the Bylaws and written policies of the Board. The Arbitrator relied on the Max-Kahn memoranda and Article 18 of the Agreement, "Professional Evaluation," to conclude that Board policy and the Agreement require the development of written documentation of a faculty member's performance toward the end that the member is given an indication of his weaknesses and strengths so that he may seek to improve his performance. The Arbitrator found only positive evaluations and favorable recommendations from the various Committees. On this record Mr. Stutz concluded that the failure to provide the grievant with proper guidance was in violation of both Board policy and the Agreement. Since the Arbitrator is barred from directing reappointment, he remanded this matter to a Select Faculty Committee as required by Section 20.5(c) of the Agreement.[24]

Reason Must Be Applicable

Arbitrator Stutz's decision was followed by Arbitrator George Nicolau's in the case of an assistant professor at Medgar Evers College.[25] The Board of Higher Education sought to dismiss the proceeding on the basis that once having asked for reasons for denial of tenure, the FSC and the grievant were barred from probing either the President's judgment or his reasons. The union argued that it did not wish to probe in these areas but rather to have an opportunity to prove that the reasons given by the president - failure to demonstrate professional growth in the areas of research, scholarly writing, creative works and public and professional activities – were not applicable to the grievant because of special circumstances surrounding his appointment and, further, that under those circumstances, the reason given could not be the real reason. In refusing to dismiss the case, the Arbitrator felt that it was not necessary for him to depart from Roberts's opinion quoted above.[26] Mr. Nicolau stated:[27]

> Thus, the quarrel is not directed to the reasons given by the President. [The grievant] does not contend that his professional growth in scholarly writing was adequate and that Trent's academic judgment in that regard was wrong. Nor does he seek to offer "contrary expert opinion" in an effort to review the merits of that academic judgment. [The grievant's] claim is that the requirements Trent imposed were known and understood to be inapplicable to him. His claim is therefore extrinsic to the reasons which Trent advanced.

The reason given by the president for the non-reappointment was:[28]

> During the period of your employment at Medgar Evers College, September 1970 to the present, you have not demonstrated professional growth in the areas of research, scholarly writing, creative works in your discipline and public and professional activities in your field.

The grievant was able to prove to the Arbitrator's satisfaction that professional growth was not expected of him and that he was never told that he was required to demonstrate a satisfactory level of performance in this area. In fact, he was "led to believe that he was being judged for tenure primarily on his administrative role and how well he performed it."[29] In this case, the only evidence offered to support the contention that the grievant knew he had to carry out research and publish was based upon discussion and was never made part of a written record, a record which showed that the grievant had carried out his administrative responsibilities very effectively. There must be written documentation to support the institution's claim that the staff member knew what he was expected to do. In the words of the Arbitrator, "Expectations must be spelled out and memorialized so that there is no mistake as to what is expected and what must be done."[30]

Procedure Must Be Correct

When an assistant professor at Richmond College was denied tenure,[31] the president informed him:[32]

> It is my considered judgment that your record does not reflect sufficient evidence of a research commitment to warrant such a recommendation.

This case is unusual in that Arbitrator Arthur Stark found extraordinary procedural violations. A P&B Committee was improperly constituted, nonmembers of the Committee were present at and participated in the discussion of the grievant's candidacy, confidential file material was seen by these nonmembers and there was an open discussion of the vote. The president testified that overstaffing of the department and the quality of the grievant's teaching record were additional reasons for his decision not to reappoint him. The Arbitrator found for the grievant and remanded the matter.

In the denial of tenure to an assistant professor of engineering sciences at Richmond College,[33] the president gave as his reason:[34]

> It is my judgment that your record of research activity is not of sufficient quality to make such a recommendation, and that the engineering program will be strengthened by the appointment of a person with an established reputation.

Arbitrator Stark remanded this grievance as well because of improper procedures utilized by the College in attempting to secure outside evaluation of the grievant's work. The College failed to secure evaluations in the grievant's field of research and failed to make the grievant's current research material available to the evaluators.

An assistant professor in the Department of Social Sciences at Richmond College who was denied tenure[35] was given the following reason:[36]

> It is my judgment that your record of research activity is not of sufficient quality to make such a recommendation.
>
> I am sorry this decision was necessary. It is my hope that you will relocate in an institution which will allow your potential to be fulfilled.

Arbitrator Nicolau found the College's outside evaluation procedure faulty and held for the grievant. The president's failure to send the grievant's work to an outside evaluator after he had promised to do so was an arbitrary action.

Evidence to Support the Reasons

A denial of tenure to an Associate Professor of Romance Languages at Richmond College, however, was sustained.[37] The president told him:[38]

> It is my judgment that our program in Spanish language and our program in Latin American Studies will be strengthened by the appointment of someone who has more inclination than your record and activities at Richmond have indicated to assume the responsibility of developing a Latin American Studies program and coordinate the teaching of Spanish with the Professional Studies Program.

Here Arbitrator Stutz found support in the record for the president's reason and denied the grievance.

Misleading Guidelines

In the case of an assistant professor being considered for tenure at Richmond College,[39] the circumstances were similar to those which governed in Arbitrator Nicolau's case at Medgar Evers College. The grievant was told by the president of Richmond College that he had not recommended him for reappointment because "it is my judgment that your record of research activity is not of sufficient quality to make such a recommendation."[40]

The PSC successfully argued before Arbitrator Stark that the grievant had been hired to develop psychology programs, that he had been told that the "publish or perish" system was not operative at Richmond College, and that research would not be a primary responsibility. The written record showed that the grievant had been successful in developing the community psychology program, that he was an excellent teacher and that he was specifically advised to continue to devote his energies to the development of the psychology program. The University, in defending, argued that the president was appropriately seeking to improve the quality of the faculty at the College and that research and scholarly publications had always been a factor in tenure decisions.

A year before the tenure decision on the grievant was to be made, the College had issued guidelines for tenure. Teaching, research and scholarly achievement and service were to be evaluated when tenure decisions were made. The guidelines stated that *"candidates are not required to show unusual merit in all of the areas."*[41] (Emphasis added) The Arbitrator found that "few of the candidates excelled in all three areas; some had few if any publications to their credit while others were primarily involved with research."[42] The Arbitrator ruled for the grievant and remanded the matter to a Select Faculty Committee.

Notice Required for Changed Standards

An assistant professor being considered for tenure at Brooklyn College,[43] did not ask for the reasons for denial of tenure pursuant to Section 9.9, but the reasons were always a matter of record and the case proceeded in much the same way as it would have had there been a formal statement of reasons. The importance of this case is the set of principles laid down by Arbitrator Nicolau concerning the "duty, if any, owed probationers when a college changes the relative weight given to appropriate tenure criteria."[44]

The grievant had begun work in the Mathematics Department at Brooklyn College in the Fall of 1970. When interviewed, she was told that the department was essentially a teaching department. Her evaluations showed satisfactory teaching with recommendations by the chairperson that she undertake greater service to the institution — recommendations with which she complied. The

Board contended that the grievant should have been aware of the changed emphasis on published research in the Fall of 1972 when the College began the search for a new chairperson who would carry forward the shift in emphasis from teaching to research. Much discussion and testimony during the arbitration proceeding dealt with the question of the precise date that the grievant became aware of the fact that she would have to undertake research leading to publication in order to receive tenure.

The Arbitrator found that the grievant had not been made aware that published research was essential for tenure. Further, the Arbitrator stated that not only must appropriate notice be given to the faculty member, but this notice must be timely so that the faculty member will have the opportunity to comply with the requirements set forth. The Arbitrator held that "there was a duty to make the standards of consideration explicit sufficiently in advance to give those affected a reasonable opportunity to demonstrate that they could or could not meet them."[45]

Guidance Must Be Meaningful

An assistant professor in the Department of Political Science at Brooklyn College was denied tenure by the president although his chairperson was confident of his ability to achieve tenure.[46] The president told the grievant that "your record shows a lack of sufficient evidence and promise of scholarly work."[47] The grievant was doing what his Department and School expected and he was not advised that he would have to publish in order to secure tenure.

There was one other factor in this case, the College's failure to obtain an external review of the grievant's work despite an agreement to do so before a final decision by the president. Arbitrator Nicolau found for the grievant.

Reason Must Be Specific

Denial of tenure for institutional reasons occurred at Bronx Community College.[48] An assistant professor in the Department of Biology and Medical Laboratory Technology was told by the president:[49]

> The reason for my decision is that, although your performance has been generally satisfactory, I cannot support your reappointment with tenure because of the declining student enrollment in your department.

A decision had been made to withdraw one line from the Department for the following year, but the Department members had not been so informed prior to their consideration of personnel recommendations for that year. Arbitrator Roberts found that the College had violated Section 9.9 of the Agreement because the reason failed to inform the grievant why the president chose not to reappoint him rather than one of the other two persons under consideration for tenure. Further, the Arbitrator found that the president failed to comply with written policy of the Board by not notifying the Department members, prior to their deliberations, that they would lose one position in the next year and by not making available information on projected declining student enrollment.

Arbitrator Roberts incorporates language into his decision to which we will return, that should be noted here:[50]

> If the Article 9 reasons provisions were to have any meaning, a grievant was entitled to know where his performance had fallen short of the mark, and that the failure to do so when viewed against a background of favorable P&B

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Committee recommendations was an arbitrary application of Board policy on reappointment.

Reasons Must Conform to Stated Policies

An assistant professor in the Department of Basic Educational Services at Queensborough Community College was denied tenure by action of the president.[51] Two policies had been made clear to the grievant by his chairperson: he was covered by a Board policy which made it unnecessary for him to pursue or earn the Ph.D. and his Department favored collaborative projects. The grievant had been told by his chairperson that he had no obligation to produce scholarly research or writing.

When the grievant asked the president for his reasons for failing to recommend him for tenure, he received this reply:[52]

> I find that you received your Masters Degree in English in 1964 from New York University. Since that time you have not completed your doctoral work and have not yet passed your comprehensive examinations. Your failure to complete or make substantial progress toward completing your doctorate raises questions in my mind as to your scholarly growth and professional activity were you to be recommended for tenure.
>
> I note that you delivered a paper in 1974, presented a slide-tape project, and participated in some workshops. In all of these activities, however, it appears that they were all joint undertakings with one or more other professors. I have great difficulty, therefore, in sorting out your individual contribution to these enterprises.

Arbitrator John E. Sands found for the grievant: "On their face both reasons absolutely contradict BHE policy and clear expressions by the [department] Chairman concerning standards which would govern grievants' employment and, by implication, his candidacy for tenure."[53]

Making reasons a matter of record may invite the rendering of academic judgments by arbitrators. Arbitrator Sands notes that a colleague of the grievant's, with a record almost identical – no Ph.D. and only joint projects, many with the grievant – was given tenure at the same time that the grievant's was denied.

Appropriate Institutional Reasons

A lecturer and an instructor in the Humanities Division of Medgar Evers College failed to receive reappointment as "Lecturers with Certificates of Continuous Employment," a form of contractual tenure.[54] When the Lecturer asked for the reasons for the president's actions the president wrote:[55]

> With the assignment of Transition students to our College effective Fall, 1976, the College's responsibilities for remediation have increased. In my judgment, at this time in your academic division, the College needs some faculty with intensive specialized graduate work in English remediation skills. You do not have such graduate work. Consequently, I cannot justify recommending you for a Certificate of Continuous Employment (CCE) which, in effect, is a permanent appointment in the College.

The president wrote to the instructor:[56]

> In my judgment the College does not require a full-time person in your area of specification [specialization]. Further, you have not made a strong contribution to the College Community.

To counter these reasons, the PSC argued that the lecturer's background was suitable, that it would be impossible to obtain the graduate education mentioned in schools in New York City and that she was never advised to take such courses. In behalf of the instructor, the PSC pointed out that she had never been advised to change her area of specialization and that she contributed to the College community and had never been told that she was deficient in this area.

In this case the Arbitrator was able to sustain the University because of "a change of an emergency nature necessary to keep the College open. It was not of an evolutionary character as in the instances relied on by the PSC."[57] Under such circumstances, failure to provide the guidance referred to by the PSC is not a fatal procedural flaw. The Arbitrator dealt with the question concerning the instructor's lack of participation in College life by pointing out that it did not appear to be the primary reason for denial of reappointment. Had it been, Arbitrator Roberts stated that his answer would have been different.

A further case under Section 9.9 involving a lecturer at Brooklyn College who was denied reappointment with a Certificate of Continuous Employment merits special attention.[58] The president advised him that he decided not to recommend his reappointment because "it was my considered judgment that your qualifications are not as outstanding as those of other individuals whose services are available, and I decided therefore not to recommend your reappointment."[59] Arbitrator Stutz felt that this reason did not meet the requirements of the Agreement. He stated: "To say that any member of the staff is not as outstanding as other individuals whose services are available, without more, hardly provides the departing staff member with useful guidance as to where he failed."[60] Stutz added: "In any event, the record is devoid of any suggestion that [the grievant] had ever been placed on notice that his service at the College was in any way falling short of what was expected of him."[61]

The Board attempted to have the Stutz award vacated by the courts. However, the decision went against the Board since the judge could find no evidence that the Arbitrator had gone beyond the submission or had engaged in fraud or misconduct. The matter is being appealed.

Specificity Revisited

General reasons were used in the denial of tenure to an assistant professor at Staten Island Community College.[62] The president wrote to the grievant that "my academic judgment is that your candidacy does not come up to the standards of the Department and the College as specified in the BHE Bylaws."[63]

This case is unusual in that the record contains considerable reference to the grievant's problems in relationships with students and to his early lackluster student evaluations which worsened over time. Arbitrator Nicolau expressed some sympathy with the University's position that a record had been established and that particularity of reasons is not required under the language of Section 9.9. He stated, however, that "the offering of generalizations to an unsuccessful candidate is contrary to its very purpose."[64] "If the President had cited those [student] evaluations as the reason for his decision, this matter would be at an end."[65] The Arbitrator found for the grievant.

Reasons After Appeal

Section 9.10, as negotiated into the 1975-1977 Agreement, reads:[66]

> 9.10 In the event that an individual appeals through academic channels a negative decision regarding reappointment, tenure, a Certificate of Continuous Employment, or promotion, and the appeal is not successful, the individual shall be so notified by the President or his designee in writing.
>
> Within 10 school days after receipt of said notice the affected individual may submit to the President a signed request for a statement of reasons for the denial of the appeal. Within ten (10) school days after receipt of the request, the President shall furnish a written statement of the reason(s) for denial to the affected employee.
>
> Consistent with Section 20.5 of this Agreement the President's academic judgment shall not be reviewable by an arbitrator.

By stipulation, it was understood that the reasons were those of the president. This provision also mandated some sort of academic appeals machinery for the University.

It is apparent that this clause is very broad in its impact. A president may not overturn a College P&B Committee very often, but many faculty members do fail of reappointment. It is natural to assume that they will appeal and, if unsuccessful on appeal, will exercise their right to ask for reasons.

The Agreement containing Section 9.10 was signed in June, 1976, and arbitration decisions concerning this provision have just begun to be handed down. The first deals with the president's inappropriate reliance on the faculty committees below when giving what must be *his* reason and with the Board's efforts to correct this while the grievance was in process.

Deferring to Lower Committees – Grievant Upheld

The grievant was denied tenure as an assistant professor in the Department of Business at Queensborough Community College by vote of his Department P&B.[67] When he asked for the president's reasons for denial of his appeal, the grievant received this response:[68]

> After a complete review of your entire academic record, please know that I do not intend to recommend your reappointment with tenure. My reason is that I find insufficient evidence of peer approval to warrant a recommendation of reappointment with tenure. Indeed, at the departmental level, I find substantial evidence of peer disapproval.

At Step 2, the University level of the grievance procedure, the Vice Chancellor's office found "that the President's reason for nonreappointment, as stated, is not sufficient in order to comply with Section 9.10 of the Agreement."[69] The president was directed to prepare and send "a new letter in compliance with 9.10 of the Agreement reflecting his academic judgment."[70]

Almost a year later, the president wrote to the grievant in compliance with the Step 2 decision:[71]

> My reasons concern themselves with teacher effectiveness and service to the college. In particular, I note: that issues were raised in regard to your attendance record; that there appears to be substantial evidence of peer disapproval at the departmental level; and that you appeared as attorney of record in a claim against the Board of Higher Education representing an individual who was a student in your class, which I believe shows an appalling lack of judgment.

The Professional Staff Congress argued that the president's first reason, "peer disapproval," was deficient because it was not the president's own reason. The

PSC said the president must exercise his own judgment on reappointment and his first letter indicated that his judgment was not independently arrived at.

The Step 2 decision, said Arbitrator Roberts, "offered [the] President an opportunity to rewrite this denial in terms of 'academic judgment' that was not the basis for the decision when made."[72] That decision found that the president's reason was not sufficient to comply with Section 9.10. The President's first letter provided only a statement that he had decided to support the department position. The Arbitrator said:[73]

> Because that reason was not a bona fide "academic judgment" by the President would not license the Board to afford him the opportunity to assign other reasons for his denial of the appeal which were not the premises for the decision to deny the appeal when arrived at. Substitutes cannot be introduced retrospectively tailored to fulfill the obligation that was breached.

The Arbitrator found for the grievant.

With regard to the new reasons in the letter, Arbitrator Roberts said they "would be inadmissible or untenable because those afterthoughts or post-action rationalizations were unrelated to the original decision."[74] In commenting on the substance of the reasons, the Arbitrator pointed out that the President knew about both the legal matter and the question of attendance in time to make use of them for his first letter.

The reader may find it interesting to know that the grievant was able to offer testimony and evidence that no attendance problem was indicated on the written record and that although there had been a question about coverage of an 8:00 A.M. class, it had been discussed with him only once. The College's failure to document this alleged attendance problem was a fatal procedural flaw, even if the reason had been given in the first letter.

The grievant stated he had been unaware of the City Charter prohibition which barred him from appearing as attorney against the Board. When informed, he removed himself as attorney of record. It was true that the student was in his class and that he had not yet given him a final grade.

Deferring to Lower Committees – College Upheld

In this case, the failure to reappoint an assistant professor in the Art Department at Hunter College was not a tenure decision.[75] When the grievant asked for reasons, the president stated:[76]

> Please be advised that I have reviewed your record and I do not see any academic basis to reverse the action of the P&B of the Department of Art. Thus, in my opinion, academic considerations and the needs of the Department and the College, constrain me from recommending you to the Board of Higher Education for reappointment for the academic year 1978/79.

Arbitrator Sands cited the Board's policy of not giving reasons for nonreappointment, the fact that there is no presumption of reappointment and a lack of evidence that anything other than proper academic judgment had been applied. He stated:[77]

> Grievant has failed to bear the heavy burden of proof which the contract places on her to establish by affirmative evidence that the employer's denial of reappointment (a) violated a contract provision, (b) was inconsistent with BHE's Bylaws or written policies, or (c) was an arbitrary or disciminatory decision and not an appropriate academic judgment.

The Arbitrator then turned to the president's letter and accepted as consistent with Section 9.10 what he stated was the president's reason, namely "that there was no basis in the grievant's record to reverse the P&B Committee's action."[78]

I do not share the Arbitrator's opinion that this is a satisfactory reason under Section 9.10. Just as the president's reason in Mr. Roberts's case at Queensborough Community College was not *his* reason, the president here offers no evidence of an independent academic judgment, but rather an acceptance of the decision of a lower committee whose record seemed correct. What has this reason to do with the grievant? Where is the explanation she is due of how she has missed the mark? Why was the reasoning of the preceding case not applied?

Beyond Generalizations

In another case at Lehman College, Arbitrator Nicolau came down on the side of Mr. Roberts in demanding specificity. An assistant professor and a lecturer being considered for tenure and CCE respectively were both denied.[79] In response to their requests for reasons, each was told:[80]

> The reason for my decision is that in my academic judgment, after a review of the record, there is not sufficient evidence to overcome the normal deference that should be given to the judgment of the College-wide peer faculty committee.

At Step 2 of the grievance procedure, this case was remanded to the College since the stated reason did not comply with the requirement of Section 9.10. Arbitrator Nicolau found this remand unacceptable, as had Arbitrator Roberts. Permitting second letters, Nicolau said, allows a president to evade the time limit established in the Agreement and "leaves the door open for a search for supportive reasons that might not have been considered initially."[81] Further, the Arbitrator states:[82]

> Section 9.10, like Section 9.9, is an exception to the normal "no reasons" policy of the University. The purpose of both sections, as I understand them, was to give unsuccessful candidates in very limited circumstances and under limited review, some understanding of where they failed, or, if the reasons were not personal, what institutional considerations led to their lack of success. These sections, to use Arbitrator Roberts' words, contain "an obligation to go beyond a generalization" and "inform the individual of the more specific reasons behind a decision".

Outlook for the Future

When Section 9.9 was negotiated, the Board's representatives were careful to limit the extent to which the provision would operate to vitiate the Board's "no reasons" policy. It was hoped that the number of grievances resulting from nonreappointment decisions would be reduced by permitting reasons to be given in carefully circumscribed situations. But despite the fact that the president need not explain reasons nor justify the judgment applied, Sections 9.9 and 9.10 have provided arbitrators with further contractual access to the academic judgment process. Arbitrators have not had to look far to find a basis for negative actions: appropriate guidance has not been provided, College procedures have been faulty and there are differences in how standards are perceived by the president and review committees at the college level as opposed to the department level.

It is clear to me that Section 9.9 has brought an end to the Board's ability to rely on the language of the Max-Kahn memorandum which points out that reasons for nonreappointment need have nothing to do with the candidate but "rather with the possibility that better candidates with wider backgrounds, more versatility or specialties which are more likely to be of use to the department in the years to come may be available."[83] Nothing in the traditions of higher education or in the Agreement requires that a nonreappointment result only from a failing or insufficiency on the part of a staff member. Tradition, in fact, points in the opposite direction. It is common for persons, at the end of their probationary period, to be informed that they will not be awarded tenure by their employing institution.

Stubborn resistance to the end of a tradition is not a good idea, however. The Arbitrators have spoken and they have done so with a virtual unity of opinion. I believe the same conclusion will be drawn when more decisions involving Section 9.10 are handed down.

Reasons will have to be specific. For if a president may say, "I can get someone better," then what meaning do Sections 9.9 and 9.10 have? More important, the faculty member's personnel file will have to support the reason given by the president.

This does not make it impossible for a president to exercise independent academic judgment; it just makes it much more difficult. Contract provisions on reasons and review procedures emphasize the job security and probationary aspects of term appointments. Since we may expect union emphasis on job security, especially in this time of substantially reduced job opportunities, college administrations must take appropriate steps to protect the right of management to exercise academic judgment while also providing faculty members with the guidance and contractual safeguards to which they are entitled.

Management's Responsibility

If, for example, a president finds that a faculty member's scholarship is not up to standards although the chairperson's evaluation is splendid, that faculty member must be informed, in writing, that upon higher level review, his work has been found wanting. This is the way to provide a foundation for an independent judgment.

In colleges where new administrations are trying to raise academic standards or where there are internal disputes concerning the importance of teaching versus scholarship, the president must be sure that appropriate documentation exists on the record. The institution may not be able to apply changed or tightened criteria to persons being considered for tenure unless they have had an opportunity to meet those standards.

Presidents at the City University now have arbitrators looking over their shoulders asking several questions: Did the staff member know what was expected of him? Was it reasonable to expect it of him or was he given a different understanding of his responsibilities? If he was deficient in a required area, did you tell him so? Did you put it in writing? Did you tell him soon enough to give him the opportunity to meet the standard? Are the reasons sufficient to justify the action taken?

Many people feel that the increased likelihood of fair dealing with probationary faculty members is worth the burden placed upon management by the requirement to give presidential reasons. But since chairpersons bear the brunt of the responsibility for open and frank evaluations of staff and since they see themselves as representatives of their faculty and not as agents of the administration, it will fall upon the shoulders of the deans and the presidents to ensure that appropriate guidance is indeed being given and that there exists on the record a basis for the president's action.

FOOTNOTES

[1] *Agreement between the Board of Higher Education of the City of New York and Professional Staff Congress/CUNY, 1978-1980.* This provision first appeared in the 1972-1975 *Agreement.* [Hereinafter cited as: *Agreement, 1978-1980.*]

[2] *Agreement, 1978-1980.* This provision first appeared in the 1975-1977 *Agreement.*

[3] *Agreement, 1978-1980.* Article 18. Prior agreements have had substantially the same terms.

[4] *Appointment and Tenure procedures with respect to the Instructional Staff.* Memorandum dated November 7, 1958, from Pearl Max and Arthur Kahn. *Personnel & Budget Procedures.* Attachment B to Board of Higher Education Meeting of December 18, 1967. [Hereinafter cited as: *Max-Kahn Memorandum.*]

[5] American Association of University Porfessors, "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointment, 1971," *Policy Documents and Reports* (Washington, D.C.: American Associaton of University Professors, 1973), pp. 8-12.

[6] AAUP "Statement," pp. 11-12. The CUNY Agreement also provides for a 3-step grievance process culminating in neutral binding arbitration.

[7] AAUP "Statement," pp. 10-11.

[8] Irwin H. Polishook, "Peer Judgement and Due Process," in *Collective Bargaining and the Future of Higher Education*, Proceedings, Fifth Annual Conference, April 1977, Aaron Levenstein, ed., National Center for the Study of Collective Bargaining in Higher Education (New York City: Baruch College, City University of New York,) p. 39.

[9] Charles Bob Simpson, "Academic Judgement and Due Process," *Proceedings, First Annual Conference, April 1973,* Maurice Benewitz, ed., National Center for the Study of Collective Bargaining in Higher Education (New York City: Baruch College, City University of New York,) p. 92.

[10] M.M. Chambers, *The Colleges and the Courts: Faculty and Staff Before the Bench* (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1973), p. 12.

[11] Chambers, pp. 21-2. Case quoted is Oar v. Trinter (U.S.C.A., Ohio), 444F.

[12] Board of Regents. 408 U.S. 564 (1972); See also William F. McHugh, "Tenure and Collective Bargaining," in Vladeck & Vladeck, eds., *Collective Bargaining in Higher Education – The Developing Law* (New York City: Practicing Law Institute, 1975), p. 61.

[13] Perry v. Sinderman, 408 U.S. 593 (1972); See also McHugh, pp. 62-3.

[14] Senate Bill 9124-A, Disapproval Memorandum #24, undated.

[15] Senate Bill 1067-A, Disapproval Memorandum #4, May 15, 1979.

[16] *Bylaws of the Board of Trustees of the City of New York,* Section 11.4a. The president shall recommend. . ."for appointment, promotion, and the granting of tenure only those persons who he/she is reasonably certain will contribute to the improvement of academic excellence at the college." Under legislation enacted in 1978, the governing board of the City University, formerly the Board of Higher Education, is now the Board of Trustees.

[17] *Agreement, 1978-1980*, p. 30.

[18] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0357-74, November 21, 1974, Benjamin C. Roberts, Arbitrator.

[19] *Agreement* dated October 1, 1973, Section 9.9. This provision remains unchanged in the current *Agreement*.

[20] Roberts, f.m. 18 *supra*, pp.20-21.

[21] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0670-74, April 25, 1975, Robert L. Stutz, Arbitrator.

[22] *Id.*, p. 5.

[23] *Id.*, pp. 5-6.

[24] A Select Faculty Committee consists of three tenured full or associate professors at CUNY who make the academic judgment. Arbitrators are empowered to remand matters to a Select Faculty Committee when they believe a remand to the college is not likely to result in a fair judgment. Remand to a Select Committee is the remedy used in the cases discussed in this paper.

[25] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0611-75, February 10, 1976, George Nicolau, Arbitrator. [Hereinafter cited as: "Nicolau I".]

[26] Roberts, pp. 20-21.

[27] Nicolau I, pp. 10-11.

[28] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0611-75, June 30, 1976, George Nicolau, Arbitrator. [Hereinafter cited as: "Nicolau II".], p. 2.

[29] Nicolau II, p. 5.

[30] Nicolau II, p. 14.

[31] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-1281-73, December 20, 1976, Arthur Stark, Arbitrator.

[32] *Id.*, p. 1.

[33] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-1282-75, February 17, 1977, Arthur Stark, Arbitrator.

[34] *Id.*, p. 2.

[35] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0902-75, April 4, 1977, George Nicolau, Arbitrator.

[36] *Id.*, p. 4.

[37] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-1283-75, April 6, 1977, Robert L. Stutz, Arbitrator.

[38] *Id.*, p. 2.

[39] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0930-75, May 5, 1977, Arthur Stark, Arbitrator.

[40] *Id.*, p. 1.

[41] *Id.*, p. 10.

[42] *Id.*, p. 10.

[43] Individual Grievant, and Board of Higher Education, AAA #1339-1148-75, June 20, 1977, George Nicolau, Arbitrator.

[44] *Id.*, p. 2.

[45] *Id.*, p. 19.

[46] Individual Grievant, and Board of Higher Education, AAA #1339-0928-77, June 1, 1978, George Nicolau, Arbitrator.

[47] *Id.*, p. 5.

[48] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-1292-77, May 25, 1979, Benjamin C. Roberts, Arbitritor.

[49] *Id.*, p. 4.

[50] *Id.*, p. 13.

[51] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-1561-77, July 17, 1979, John E. Sands, Arbitrator.

[52] *Id.*, pp. 4-5.

[53] *Id.*, p. 8.

[54] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0248-78 and #1339-0249-78, September 14, 1979, Benjamin C. Roberts, Arbitrator.

[55] *Id.*, p. 4.

[56] *Id.*, p. 6.

[57] *Id.*, p. 23.

[58] Individual Grievant, and Board of Higher Education, AAA #1339-0970-75, June 15, 1976, Robert L. Stutz, Arbitrator.

[59] *Id.*, p. 3.

[60] *Id.*, p. 5.

[61] *Id.*, p. 5.

[62] PSC/CUNY and the City University of New York, AAA #1339-1503-76, January 24, 1980, George Nicolau, Arbitrator.

[63] *Id.*, p. 3.

[64] *Id.*, p. 11.

[65] *Id.*, p. 10.

[66] *Agreement, 1975-1977*, p. 9. This provision remains unchanged in the current *Agreement*.

[67] Professional Staff Congress/City University of New York and Board of Higher Education, AAA #1339-0135-78, February 13, 1979, Benjamin C. Roberts, Arbitrator.

[68] *Id.*, p. 4.

[69] *Id.*, p. 4.

[70] *Id.*, p. 4.

[71] *Id.*, p. 5.

[72] *Id.*, p. 17.

[73] *Id.*, pp. 17-18.

[74] *Id.*, p. 18.

[75] Individual Grievant, and Board of Higher Education, AAA #1339-0877-78, May 30, 1979, John E. Sands, Arbitrator.

[76] *Id.*, p. 3.

[77] *Id.*, p. 5.

[78] *Id.*, p. 8.

[79] PSC/CUNY and Board of Higher Education of the City of New York, AAA #1339-0408/09-78, January 10, 1980, George Nicolau, Arbitrator.

[80] *Id.*, p. 4.

[81] *Id.*, p. 8.

[82] *Id.*, p. 10.

[83] *Max-Kahn Memorandum.*

14. BARGAINING AND CONFLICT MANAGEMENT: NEW DIRECTIONS FOR ACADEMIC NEGOTIATIONS

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Collective bargaining is a process of shared authority which is used in some institutions to manage conflict which at least one of the parties does not believe can be resolved through more traditional academic structures. The identification of academic bargaining as a form of conflict management does not necessarily suggest its outcomes, however, and indeed conflict can take one of two quite different directions. Conflict can be "constructive," solving the problems of the participants and leaving each satisfied with the outcome and with the feeling of having gained as a result. Conflict can also be "destructive," resulting in dissatisfaction by both parties and the feeling that each has lost as a consequence (Deutsch, 1969).* A specific characteristic of destructive conflict is its tendency to escalate, to increase in size and intensity, to become independent of the processes which cause the initial conflict, and to rely increasingly upon the use of power, coercion, and deception.

Academic bargaining researchers have for the most part viewed the bargaining process from administrative, political, institutional or legal perspectives, and their work has been extraordinarily useful in helping us to understand and to a limited extent direct the growth of this relatively recent phenomenon. Overlooked in this early flurry of research and writing, however, has been the fact that academic bargaining can also be usefully viewed as an example of intergroup conflict which, although occurring within certain legal limits and ritualized formats, can engender the same behavioral characteristics seen in other groups in conflict. This paper will briefly explore three basic ideas:

First, that an understanding of intergroup conflict can be useful in understanding why people behave as they do at the bargaining table.

Second, that it is possible to analyze the accepted structures and processes of academic bargaining to determine if they are likely to support constructive or destructive outcomes.

Third, that it is possible to design new orientations and bargaining structures which can help parties use academic bargaining more creatively than they now do.

Conflict and Compromise

The orientation which a group brings to bargaining depends (1) upon the degree to which it is committed to satisfying its own concerns, and (2) the extent to which it is concerned about the expressed interests of the other group and willing to help them achieve their goals (Thomas, 1976). The orientation which we call "competition" exists when a group wishes to achieve its own goals, and has no concern for the interests of the other group at all. This combination of assertiveness and uncooperativeness leads to win-lose bargaining in which the gains of one group are seen to come at the expense of the other. Competition is probably seen by many if not most participants as the natural mode of bargaining, and through predictable intergroup processes which shall be briefly mentioned shortly, it moves the parties almost inexorably towards destructive conflict.

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*References will be found on pp. 129-130.

When groups of equal power are involved in competitive conflict the result is often a compromise, a lose-lose orientation to conflict. While competition can lead to *one* group achieving its goals, compromise ensures that neither party has its interests fully met. There are occasions when compromise is the best outcome that the parties can achieve, particularly when they are bargaining over the allocation of a limited resource. In many cases, however, parties compromise because they are unaware of the creative potential of a situation, because they do not have the problem-solving skills to exploit it, or, as is often the case in collective bargaining, they find themselves in a situation in which compromise is expected by definition and is socially acceptable.

Competition and compromise are not the only available orientations towards conflict, however. When a group combines strong concern for its own interests with an equally strong concern for seeing that the needs of the other group are also met, a collaborative relationship can develop in which the parties search for integrative solutions meeting both of their needs. This requires a problem-solving approach, because such solutions often must be invented by the parties through their joint activities. The collaborative orientation can result in win-win situations, since each party is able to satisfy its needs while at the same time the relationship between them is strengthened and supportive of further cooperative activities. The outcome is constructive conflict.

The Constructive Approach

The thesis of this paper is that neither compromise nor competition is a constructive means of managing conflict in academic bargaining, and that groups can more fully achieve their own goals not by defeating other groups or "splitting the difference" with them, but by working together towards mutually acceptable solutions. Opportunities for such collaborative approaches should be available in academic bargaining to an even greater extent than in any other collective bargaining setting. Fully realizing these opportunities is, in my judgment, a critical goal if academic bargaining is to serve as a structure for strengthening, rather than dividing, the unionized college or university.

However, if we wish to make bargaining the constructive force for institutional development which it can be, it will be necessary to significantly change its form in some fundamental way. Some of the reasons for this will be found in the nature of conflict between groups in competition.

The Dynamics of Conflict

Competing groups behave in remarkably similar ways, whether they consist of boys engaged in "color war" competition at summer camp, union and management negotiators at the bargaining tables, or diplomats who believe each other's interests to be incompatible. Indeed, the dynamics of intergroup conflict can be created in the laboratory by forming groups of individuals who have had no previous contact with one another. On the basis both of these experimental situations and the observations and studies of groups in other competitive settings, a number of generalizations related to academic bargaining can be made:

1. It is possible to create competitive groups merely by placing them in a situation identified as competitive. Academic bargaining is just such a situation.

2. Perceiving a situation as competitive distorts the judgment of group members so that they are likely to overestimate the quality of their solution to a problem and underestimate that of the opponent. Academic bargainers are likely to think more highly of their own demands than those of the other side, regardless of actual merit.

3. Once a group creates a solution to a problem, it becomes committed to it and is literally unable to understand the elements of alternative solutions. Academic bargainers are likely not to really understand each other's position, or to accurately assess the importance which the other side attaches to each of its demands.

4. Opportunities to gain further information about an opponent's solutions will be used to attack and belittle the opponent, rather than to study the proposal. The academic bargaining conference will often be used as a forum for justifying one's own position, and making sarcastic remarks about the position of the other team, rather than trying to understand different perspectives.

5. Stereotypes of the "other side" develop, leading to what has been called the Enemy Image (Frank, 1968). The image, once established is maintained and reinforced through restricting communication, selective filtering, and interpretation of the evidence to fit the image.

6. The stress of competitive interaction, often increased by the use of deadlines and threats, distorts the way the parties see the situation, leading to "cognitive and behavioral rigidity, a tendency to react quickly and violently, underestimation of an opponent's capacity for retaliation, interpretation of a conciliatory move on the part of an opponent as a trick or a sign of weakness, a lowered tolerance for ambiguity, and a tendency, on the part of the decision-makers, to interpret messages that reinforce their preconceived view of a crisis." (Druckman, 1971, p. 532-3).

These processes of cognitive distortion, stereotyping, a premature commitment to alternatives, and inability to understand the position of the opponents, can quickly develop in an academic bargaining situation predefined as competitive, in which the parties may have already attacked each other, before bargaining, in a representational election, and in which inexperienced parties come to the table without a full understanding of the bargaining process. They tend to lead to destructive conflict in which either one party tries to subdue the other by virtue of superior power, or a compromise is arranged in which both parties lose. Opportunities for creative and collaborative interaction are foregone, and both parties lie in wait for "next time."

Significance of Bargaining Structure

If these are the natural consequences of groups in conflict, to what extent are they modified by the structures, expectations, and common practices which we

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have developed in academic bargaining? Does the bargaining relationship change ordinary group interaction so that communication between faculty and administration is enhanced and clarified rather than diminished and muddied, so that levels of trust are increased rather than reduced, and so that collaborative orientations and behaviors replace competitive and destructive ones? To the contrary, I would argue that for the most part our current structures almost appear designed to support a competitive orientation, as do the "instructions" which bargainers receive from any of us writing in the field. A complete analysis of the effect of accepted structure upon the course of academic bargaining is presented elsewhere (Birnbaum, in press) and is too involved to be given more than brief attention here. Three specific examples should clarify the concept, however.

First, we know that destructive intergroup conflict increases as groups become more uniform internally and more different from each other, and that the potential for destructive conflict decreases as groups are divided by cross-cutting sub-groups and having overlapping members. Academic bargaining increases the possibility of destructive conflict by "clarifying" and differentiating the previous fuzzy and overlapping roles of faculty and administration, labelling each group as being separate from the other and having conflicting interests, and requiring each group to present a united front at the bargaining table.

Second, since creative solutions are never obvious ones (if they were, difficult problems would not be difficult), finding answers that meet the needs of both parties requires intensive collaborative activity during which members of both groups can tentatively explore numbers of alternatives. In contrast, academic bargaining proceeds by having each group consider its problems separately, unaware of the needs and interests of the other. Indeed, what we in bargaining call "demands" or "counter-offers" are really unilateral solutions to problems. Since they are prepared separately by each side, they tend to be adopted prematurely without full consideration of alternatives. Once each side becomes committed to its own solution it becomes virtually impossible to consider creative alternatives which might not have occurred to either one, and which in fact may be superior for each party than the one they themselves constructed.

As a final example, creative and collaborative bargaining requires the parties to be aware of the interests and values of the other. An orientation towards helping the other side achieve their goals can only be satisfied if those goals are known. Bargaining, on the other hand, relies to a great extent on misdirection, and the limiting of communication. Bargainers are urged to fight for issues they don't care about, to withhold from the opponent an indication of the priorities which are assigned to different items, and to limit communications at the table to the chief negotiator so that one's real intentions are not inadvertently disclosed.

Each of these three examples, and many others that could be cited, immediately focuses attention upon the competitive aspects of the process, and facilitates the movement toward destructive conflict.

If this analysis is correct, it suggests that academic bargaining as now practiced can have highly unfortunate consequences for institutions utilizing it as a means of managing conflict. Some have suggested that in fact the structures of bargaining are so inimical to the academic process that it should be prohibited,

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or at least limited in scope so that its impact upon organizational functioning can be minimized.

This position, in my judgment, has two major weaknesses: First, academic bargaining serves powerful organizational, professional and institutional needs. Merely removing the bargaining relationship will not solve the problems that initially led to bargaining in the first instance, and can in fact increase destructive conflict by removing a channel through which some of these issues can be articulated. The truth of this assertion will be sorely tested in the post-*Yeshiva* years ahead. Second, through equalizing power and facilitating direct confrontation of the issues, academic bargaining offers an exciting opportunity for creative and constructive approaches to conflict which may not be present without it in many academic institutions.

A Constructive Alternative

Academic bargaining can thus be either an extremely useful mechanism for institutional change, or a devastating structure for destructive conflict. The search for alternatives to destructive orientations to academic bargaining, and for processes through which bargaining can be used to support creative problem solving and appropriate levels of faculty involvement in institutional governance is thus a critical need.

In an exciting book about industrial bargaining, written 15 years ago, which should be read by anyone concerned with new bargaining orientations, James Healy wrote:

> It is easy to say that the parties should bargain imaginatively and exhort them to take advantage of the freedom which collective bargaining can provide if used "correctly" or imaginatively. However, it is much more difficult to know how to start such an approach. Old prejudices and fears on both sides of the table must be overcome, and in most cases a fundamental change of attitude is required on the part of both parties. . . .Perhaps more widespread is the frustration of being trapped by the traditional methods of bargaining. The parties may desire a more sensible and rational approach to their problems but do not know where to start, how to proceed or what the eventual outcome might be. (Page 42.)

Just as the behavioral sciences can offer insights into the causes of destructive intergroup conflict, so they can suggest ways in which the bargaining relationship may be changed. Some of these changes can be tactical in nature, that is, they can be accomplished within present bargaining structures and would have the effect of decreasing the probability of destructive relationships. For example, suggestions to include department chairmen in the unit, to avoid pre-bargaining strategy, to recognize the union without a representational election (if possible), to avoid use of external negotiators, and to bargain over specific issues rather than matters of principle, are all grounded in behavioral science theory. Each of them and many others like them which are conceptually based, can be helpful in reducing the natural tendency of academic bargaining to move towards destructive conflict But each by itself cannot really lead to creative bargaining because they all assume that the bargaining relationships and structures remain essentially the same. If we are to develop new bargaining relations more supportive of academic goals and values, we must consider changing the basic strategies and structures within which the parties interact, and not merely the tactics which each brings to the table.

I believe that there are three basic strategic approaches to creative academic bargaining: First, if creative bargaining should be based on problem-solving rather than competition, we must alter existing processes to increase their problem-solving potential. Second, if two parties have difficulty regulating conflict, third parties can be used to help them constructively manage it. And third, if the structure of bargaining itself poses a major obstacle, then it can be changed. Since it is not possible in this paper to fully describe each approach in detail, it might be useful here to give an example of just one alternative within each of the three approaches and to briefly mention the conceptual orientations that support it.

The Problem-Solving Attitude

The first basic strategy consists of determining the specific aspects of a bargaining relationship that inhibit problem-solving and then having the bargainers agree to change them. Many critical elements related to effective problem-solving are under the mutual control of the parties in academic bargaining but usually remain unexamined because they incorrectly assume that they cannot be altered.

One specific barrier to problem-solving, and a solution based upon changing bargaining processes, concerns the general acceptance of the notion that once a contract has been agreed to, bargaining should not be done again for a stated term. This approach is consistent with competitive, win-lose bargaining in which the final agreement codifies the power relationship between the parties at the time it was completed, therefore making it always to the disadvantage of one of the parties to change. But for parties committed to the development of more cooperative and collaborative strategies, it would appear more sensible to deal with problems as they emerge, rather than permit them to fester until the arbitrary date upon which contract renegotiations are to begin. One way to permit this is to conceive of bargaining as an ongoing, rather than a periodical process.

Acceptance of this concept of "continuous bargaining" might begin with the agreement of both sides to study an issue in the contract which now was considered troublesome by either one of the parties. If agreement on a change could be reached, the revised wording could be inserted at any time into the contract.

Initially the parties might wish to limit the number of items for which this could be done. But if the parties found the process agreeable, and developed experience in using it, it is possible to conceive of a situation in which, except for salaries and fringe benefits, "contracts" would not have termination dates. A policy once established through the bargaining process would remain in force until either party wished to have it changed and initiated bargaining concerning it. Done in this manner, each provision could be dealt with as a specific problem and evaluated on its merits, rather than viewed as a potential trade-off for other items under discussion. Parties would be more likely to experiment with new ideas and innovative approaches to problems as well, knowing that if their agreement turned out to have unanticipated consequences, study and possible change could occur at any time.

Use of Third Parties

The second basic strategy leading to more constructive bargaining is the use of third parties in the bargaining process. Behavioral scientists have identified a number of constructive functions which third parties can perform in intergroup conflict situations (Deutsch, 1973). Unfortunately, the traditions of collective bargaining support the notion that the best bargains are those arrived at by the two parties without the assistance of neutrals in any form. For that reason, their use in bargaining has for the most part been restricted to involvement at impasse, the point at which the parties have exhausted most of the flexibility in the bargaining situation, and at which a third party can be least effective in supporting creative bargaining approaches.

Rather than consider third parties solely as an alternative at impasse, creative academic bargaining can make use of third parties at various stages in the bargaining process: before bargaining commences, while bargaining is continuing, and even after bargaining has been concluded. For example, one pre-bargaining approach involves the use of third parties to conduct workshops at which the teams can develop better communications and more accurate understandings about each other (Black, Shepard and Sloma, 1965). Destructive conflict caused by inter-group competitions leads to misunderstandings of the other's position and distortions in their communications systems which perpetuate and intensify the conflict.

Parties may develop "images" of the other which are resistant to change and which make it difficult for them to engage in collaborative activities. In an intergroup conflict workshop which occurs before bargaining starts, third-party neutrals work with both bargaining teams to help them to more accurately assess the goals and perceptions of the other and to achieve a better understanding of the effects of their own behaviors upon those of the other side. The process is based on the theory that the image each group has of the other can be altered through controlled confrontation, and that changes in communication and perceptions will enable the parties to increase levels of trust, identify more clearly the real issues between them, and move toward a more constructive bargaining relationship with greater emphasis upon problem-solving. In the two-day sessions required for this activity, third-party neutrals can help each party to develop its images of itself and of the other group, share these images between groups, and explore the reasons for the discrepancies which exist between the images each group has of themselves and the other. These new perceptions constructively alter group interactions when bargaining subsequently begins.

Revising Bargaining Structure

The third major strategy of creative bargaining is to change the bargaining structure so that the development of collaborative bargaining relationships in some areas is not inhibited by the need to use competitive approaches in others. To understand the conceptual orientation of this approach it is necessary to consider the fact that competitive bargaining is effective in situations in which what one side wins the other loses (as for example in bargaining over salaries), while collaborative bargaining is effective in dealing with situations in which it is

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possible for both parties working together to win more than either can by competing.

Unfortunately, the harsh, secretive, and combative approach of competitive or distributive bargaining tends to overwhelm the open, trusting, and collaborative problem-solving orientation necessary for integrative bargaining. Because of the need for negotiators to adopt consistent bargaining styles, interactions developed during bargaining for money are likely to interfere with attempts to problem-solve on other matters. One solution to this problem is to separate the two kinds of decision processes as much as possible by changing the structure of bargaining itself, by having different people do each, by placing the items on different agendas, by dealing with the items at different times, by establishing ground rules of separation, or by separating issues spatially (Walton and McKersie, 1965).

One common structural way of achieving such separation, although it is usually not referred to or considered in behavioral terms, is through the concept of dual governance. A less utilized alternative is the establishment of joint study committees. These committees are groups set up by the two bargaining parties charged with the responsibility for investigating one or more specific problems and making recommendations back to the full group. Occasionally such committees may have their agreements inserted directly into the contract. Participants may include members of the bargaining team, persons not on the bargaining team, and occasionally third-party neutrals. The study team meets away from the bargaining table, and engages in problem-solving approaches which are difficult to sustain in the traditional bargaining environment.

Study committees make use of many of the devices found through behavioral science research to be effective in problem-solving, integrative bargaining approaches. It makes participants problem-centered rather than solution-oriented, jointly collects facts shared by all members, forms cross-cutting groups which reduces destructive conflict, increases dissensus needed for effective problem-solving, and by functioning outside the traditional bargaining process is less affected by stereotypes, group loyalties and a reluctance to agree to proposals presented by the "other side." Although some experienced academic bargainers have warned against the use of study committees, I believe that they offer an extremely helpful alternative approach to parties interested in bargaining more creatively.

Unique Academic Models

These brief suggestions indicate that there are a number of ways in which the parties to academic bargaining can significantly alter their relationships to promote constructive and creative outcomes of conflict. Through increasing the problem-solving potential of their bargaining, utilizing third-party interventions to change the bargaining process, or altering the bargaining structure, it is possible to create new models of bargaining which meet the unique needs of the academic enterprise. Three things about the use of these new orientations should be mentioned.

First, each is consistent with traditional academic norms, and thus supports the acceptance and integration of bargaining into institutional life with minimal organizational disruption.

Second, these suggestions for new bargaining orientations arise from the felt need to construct bargaining models supported by the findings of behavioral science which are more consistent with the needs of the academic world than the so-called industrial model. It is therefore ironic that each of them has been tried and found to be either highly successful or extremely promising in industrial bargaining contexts. Healy (1965) has reported a number of situations in which variants of continuous bargaining were in use fifteen years ago; pre-bargaining third-party interventions are the programmatic focus of the new Federal Mediation and Conciliation Service program of relations by objectives which have been used in major industrial bargaining disputes (Popular, 1977); and the use of joint study committees has a long history going back to the Armour Automation Committee and the Human Relations Committee in Basic Steel, and continuing to this day (Federal Mediation and Conciliation Service, 1978).

Finally, these new orientations, including the specific alternatives briefly described here as well as many others which can easily be constructed based upon existing knowledge and experience in diplomacy, industrial relations, and similar applied fields, may be seen as having a high degree of risk associated with them. They are much different from the behaviors and activities commonly supposed to represent orientations toward academic bargaining. For the most part, they are untried in institutions of higher education.

It should be remembered, however, that the adoption of collective bargaining during these early years is itself a risk; its eventual outcomes are far from certain, and its effect upon the future course of higher education and the relationship of faculties to their institutions and their profession can at this time only be the subject of speculation. Yet experience with bargaining in other contexts suggests that, at least in some situations, institutions which fail to understand the powerful dynamics for spiralling conflict inherent in the ordinary structure and processes of bargaining, and fail to take steps to control them, may find the bonds between faculty and administration disrupted or conceivably destroyed. If this happens, the institution may have lost a good measure of the values that constitute its essence and make it a distinctive agency of society. The risk may be great; the risks of not acting may be greater.

Bargaining can be a powerful force for creative conflict in the unionized college or university. To utilize it fully, however, takes much more attention than we have given until now to changing it so that it may better support the needs of the academic world.

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15. THE GRAY AREA BETWEEN DUE PROCESS AND ACADEMIC JUDGMENT

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Arbitrator

The process of being appointed or reappointed to a college teaching position, and ultimately achieving tenure, is for most college teachers a struggle over which they have little control. Their fate is in the hands of administrators who make the decision without responsibility to anyone for the outcome no matter how arbitrary or capricious it may seem. The decision is usually made by the College President who makes his recommendation to the Board of Trustees. There is no appeal from the recommendation of the College President or from the vote of the Board of Trustees.

There are two elements in making such a decision. The first is the procedure, i.e., the steps from the initial application to the ultimate decision. The second is the substantive decision itself, the weighing of the pros and cons that enter into the judgment. Every applicant is concerned about both, that the procedures be followed in proper fashion and that the decision be made fairly on the merits.

Academic Judgment in Operation

Unions of college teachers consider it a matter of prime importance that applicants receive uniform and fair treatment. They demand that the procedures be known in advance and that they be followed, in other words that there be procedural due process. They also want protection from what may seem to them an arbitrary and capricious decision by having an appeal from the academic judgment, the judgment by the academy in the person of the College President. In the main, they have succeeded in achieving guarantees of due process but have failed to dent the impregnable fortress of academic judgment.

Academic judgment is surrounded by a mystique which has made it unassailable. It is said to be the collective judgment of the College and, therefore, of one's peers. One should not question the judgment, which is said to be the consensus of one's colleagues.

The procedure for reappointment is elaborate and seems basically democratic but in reality it is just the opposite. A candidate for reappointment is judged by a committee of his department which makes a recommendation, which is forwarded to the Dean by the department head who adds his recommendation. The Dean then adds his recommendation and sends it to the Vice President in charge of academic affairs who sends it to the President who presents his recommendation to the Board of Trustees. Although every level of collegiate life is asked to contribute to the ultimate decision, it is really the decision of the President which counts since the Board of Trustees usually does what he recommends. And, since there is no appeal from the President's decision, he can disregard, and sometimes does, all the favorable recommendations from below. The only restraints are his conscience and his regard for the faculty's opinion.

It would be more equitable to make academic judgment subject to the grievance procedure but administrators argue that arbitrators are not qualified to hear appeals about academic judgment. Such an argument, in my opinion, has no validity. The same argument has been used in the industrial world but is generally considered discredited. One does not have to have the experience of meeting a payroll to be able to judge whether a factory manager has been fair. Likewise, one need not be an educator to judge the propriety of an academic judgment. If a college president's decision is just, he ought to be able to defend it before an impartial tribunal. Unless he does so, what confidence can an applicant have in a system under which the final decision is made by a person who is interested and, therefore, by definition biased?

Due Process – An Alternative

Given the circumstances, it is understandable that the success of the unions in the field of higher education has been in the field of due process rather than academic judgment. The procedures have always been, more or less, known. They were devised by college administrations, long before the unions entered, to

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show the fairness and equity with which each applicant is treated. The hitch is, of course, that the ultimate decision is protected by the concept of academic judgment. As long as the administration controlled the academic judgment which is the substance, it did not matter that it gave up control over the form. Hence, unions receive little opposition to the spelling out of due process and to making it subject to the grievance procedure, including ultimate appeal to an outside arbitrator. I know of no contract in which a grievant is permitted to protest against the academic judgment involved.

As long as the unions have been unable to persuade the administration to make academic judgment a subject matter of the grievance procedure, they have had to do what they could with due process. They have spelled it out and have elaborated upon it. They have made it known to all applicants and have subjected it to review and amendment. They have been concerned with more than the order of procedure and the time limits for each step. They have succeeded in making uniform and equitable treatment a matter of due process and have demanded that the criteria for any academic judgment be stated in advance and not changed in midstream.

An example of how far-ranging a statement of due process can be is the following excerpt from the current agreement at the New Jersey State Colleges:

> The processes for appointment and reappointment of employees utilized in the College, if universally applicable, or in the division, department or similar unit in which the employee is employed shall be fairly and equitably applied to all candidates. The process shall provide for consideration based on criteria appropriate to the College and the work unit. The current and applicable process including a statement of such criteria shall be provided in written form for the understanding of all affected employees. Contemplated changes in these processes shall be presented to the local UNION, views exchanged and a cooperative effort to resolve differences made prior to the recommendations of the President to the Board of Trustees for action except that broad structural changes or major revisions of such procedures are understood to be negotiable between the Local UNION and the College.
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> The Local UNION may also suggest changes in the process which shall be directed to the President or his or her designee. (Art. XII, Sec. J)

Despite success in having the criteria stated, violations thereof are nevertheless not subject to arbitral review. The New Jersey agreement states, "The arbitrator shall not substitute his or her judgment for academic judgments rendered by the persons charged with making such judgments." (Art VII, Sec. D 3)

What is subject to the grievance procedure is stated in the following provision:

> Matters pertaining to promotion or nonreappointment shall be grievable under this agreement only upon the basis of claimed violations involving discriminatory treatment in violation of Article II, or denial of academic freedom in violation of Article V, or violation of promotion or reappointment procedure specified in Articles XIV and XIII, or applicable written college procedures (except as provided in E. 4. below). In all such cases the burden of proof shall be upon the grievant. In no case may an arbitrator recommend promotion or reappointment of a grievant. Rather, where appropriate, the remedy shall be to remand the matter to the proper level of the involved College for reconsideration of the matter and elimination of impropriety in the decision making process. (Art. VII, Sec. E. 1.)

Procedural Issues

Let us now consider some of the grievances over procedure which have gone to arbitration and note what effect they have had on the substantive result.

Three librarians who were up for tenure were not reappointed and grieved because, among other violations of procedure, they claimed that the Director of the Library had compiled recommendations for reappointment in priority order before he received the input from the library personnel committee, contrary to the established procedure. To have done so was deemed a violation of due process because, in effect, it ignored the influence of the personnel committee's recommendation. Although the union was successful in prosecuting the grievance, the substantive result was nil because the arbitrator was limited to remanding the applications to the appropriate level for reconsideration and elimination of the procedural defect. This was in accordance with the agreement which states, "In no case may an arbitrator recommend promotion or reappointment of a grievant."

The arbitrator is limited to a remand, which means sending it back to the Director of the Library who is free to make priority recommendations after receiving the recommendation of the personnel committee. It is hardly likely that the Director would change his judgment and to overcome the possibility of a repetition of the result, the union has succeeded in obtaining a provision under which the arbitrator has an available alternative. The agreement now provides that "the arbitrator may, where appropriate, direct that the President of the College, in consultation with the Union, appoint an *ad hoc* review committee to substitute for any individual or committee which had been involved in the previous promotion or reappointment action."

The appointment of an *ad hoc* committee is no assurance of a favorable result but it does open the door to control of the academic judgment because of the union's influence on the appointment of the committee members.

Allegations of Discrimination

A second class of grievances which comes closer to breaching the rule prohibiting the questioning of academic judgment are cases in which discrimination is charged The basis for grievances alleging discrimination lies in the promise that the applicant will be fairly and equitably treated. It is obviously unfair and inequitable to be rejected because of sex, color, age or any other irrelevant consideration.

The agreement may expressly forbid discrimination as the New Jersey College Agreement does. Article II provides:

> NON-DISCRIMINATION. The STATE and the UNION agree that the provisions of this Agreement shall apply equally to all employees and that there shall be no intimidation, interference, or discrimination because of age, sex, marital status, race, color, creed or national origin or political activity, or private conduct which does not interfere with an employee's employment obligation.

Grievances concerning discrimination are difficult to prove and the grievant usually has the burden of proof which heightens the problem. The difficulty is that discrimination must usually be proved by indirection. It is not usual that direct evidence of discrimination is available. A dean does not accompany his recommendation with the candid excuse that So-and-so is not recommended because of sex or age. The grievant must generally rely on pattern behavior, i.e., evidence that fewer persons of the discriminated-against class are appointed. But once the union can get past the initial burden of proof the onus is upon the administration to show that its decision is not based upon bias but upon the criteria involved. The options open to the administration are limited. It is not obliged to justify its academic judgment but unless it does, a finding of discrimination may be made. Hence, it may be forced to justify its judgment.

One case involved a 57-year-old candidate for reappointment. The Union charged that the college discriminated against him because of his age. It showed that the non-retention of teachers over 55 years of age was twice that of any group. The State not only denied discrimination but affirmatively stated that his non-retention was in accordance with agreed-upon criteria and was the academic judgment of the administration. The State offered proof which consisted of the fact that his students were lukewarm about him, a negative indication. He had offered only two publications without publication date. One looked like an in-house document. The other was the candidate's unpublished dissertation. The arbitrator held that this evidence effectively refuted the charge of discrimination. The case against the candidate was admittedly strong. One might wonder whether the administration would have defended its academic judgment if the case were weaker.

The Evidentiary Problem

What makes this case unusual was the tactics employed by the Union. It sought to cross-examine the administrator on the procedure he used and his rationale in reaching his conclusions. The State objected to this line of inquiry because it entered into the area of academic judgement barred to the arbitrator. The union argued, however, that it had the right to inquire into the official reasons for the non-retention to show that those reasons were not the true ones and only served to cover the real reason discrimination. The decision on this point was as follows:

> This argument poses a dilemma. If the arbitrator rejects the evidence, the Union is deprived of a major avenue to proving discrimination. If the arbitrator accepts and evaluates the evidence, he may be violating the injunction of Article VII. In my opinion, the dilemma is resolved if the arbitrator confines his evaluation of the factors entering into the academic judgment to the broad question of whether it was a genuine academic judgment or whether the person who made the judgment acted so arbitrarily and capriciously that the judgment could have been made only to cover up an ulterior purpose.

The implications of this decision are even more profound. If a union can maneuver the administration into justifying its academic judgment even though limited to the question of whether it was arbitraty or capricious, it has bridged the gap between due process and academic judgment. Form and substance are no longer distinctly black and white but gray. I am waiting for the next shoe to drop. What would happen if the Union charged that the academic judgment was so arbitrary and capricious that the grievant was denied due process since his application was not fairly and equitably judged? A typical example might be the charge that the College did not intend to grant tenure and that the due process was a sham because the result was foreordained. Unless the College defends its academic judgment, the procedure would be revealed as a charade. The argument that there can be no due process without the right to appeal an academic judgment begins to make sense.